No. 9240.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

B. C. SCHRAM, as Receiver of the First National Bank-Detroit, a national banking association,

Appellant,

vs.

BERTHA H. ROBERTSON,

Appellee.

BRIEF ON BEHALF OF APPELLEE BERTHA H. ROBERTSON.

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STATEMENT OF THE CASE.

Appellant, in his "Statement of the Case" (App. Br. 7), reviews his bill of complaint as though it were an action upon an express written contract and, accordingly, takes such excerpts from his bill of complaint as, when standing alone, might convey the impression that such were the fact. Yet, when the excerpts so taken from the bill of complaint are considered in connection with the associated paragraphs, it will then be observed that it goes only to the point of laying the foundation for an action upon a statutory liability in the sense that the appellant is pursuing corporate shareholders who have, by their acts in the transfer of shares, done so with the intent and operative effect of relieving themselves from superadded liability. The bill of complaint, in order to support this theory,

NOTE: *Unless otherwise noted, all italics and emphasis are appellee's.*

makes such allegations as go to show that the defendant shareholder in the Detroit Bankers Company was in truth and in fact and is the actual, beneficial owner of First National Bank-Detroit shares and such facts are alleged as will enable the Court to look through corporate entity to determine who are the actual, beneficial owners. Appellee, on the other hand, presents the cause of action herein as it is actually made in the bill of complaint. We maintain that the effort of the appellant to now switch this cause of action from one upon a statutory liability to one upon an express written contract, either from the standpoint of an assignee of such contract or as a third party for whose benefit such contract was made, cannot be permitted.

It will be noted that the bill of complaint was filed on July 7, 1938. [R. 22.] The defendant filed her answer on August 17, 1938. [R. 31.]

The defendant filed an amended answer, in which she set up the California statute of limitations, section 359, Code of Civil Procedure [see Appendix p. 18], on January 23, 1939 [R. 33], and defendant filed her motion to dismiss and for judgment on the pleadings on March 21, 1939. [R. 35.]

We will show herein that the bill of complaint was drafted as and is an action to enforce a statutory liability; the contract allegations are only explanatory of his theory that the shareholders were the actual beneficial national bank shareholders.

Thus appellee contends that the bill of complaint is grounded on a statutory liability. In order to show this more clearly, it will be necessary to go into the early litigation growing out of these bank failures to disclose and develop the basic theory and concept of appellant in framing the bill of complaint. As the case develops we will make clear to the Court why it was impossible for the pleader to state a cause of action upon an express contract

entered into for the benefit of a third party. The appellant, realizing the weakness of the case, and in view of the holding of this Court in *Johnson v. Green* (C. C. A. 9, 1937), 88 Fed. (2d) 638, saw after appellee pled the statute of limitations, that the cause was lost unless there could be injected into it a new cause of action; this the pleader attempted to do, first, by claiming it to be a third party action, and then by filing a motion on March 27, 1939, for leave to file a supplemental bill wherein [R. 36] the appellant sets up a new cause of action grounded upon the assignment to the appellant by the receiver of Detroit Bankers Company:

> "All right, title and interest of Detroit Bankers Company, a Michigan corporation, and/or its receiver, in and to the proceeds of the assessment levied against the shareholders of First National Bank-Detroit by the Comptroller of the Currency of the United States on or about May 16, 1933, and in and to the right to enforce and collect such assessment against the shareholders of said Detroit Bankers Company, including, but not by way of limitation, all right, title and interest of the said Detroit Bankers Company and/or its receiver in and to the contract created by Article IX-A of the Articles of Association of Detroit Bankers Company." [R. 38.]

The supplemental bill further stated that said assignment was made to appellant herein by the receiver of the Detroit Bankers Company under date of October 6, 1938, pursuant to an order of the Circuit Court of Wayne County, Michigan [R. 38], and said supplemental bill, as sought to be filed, prayed judgment against the defendant as prayed in the original bill of complaint. [R. 39.]

It will be noted in the assignment proper [R. 39-43, incl.], it assigns all the right, title and interest under and by virtue of Article IX-A of the Articles of Association of the Detroit Bankers Company running in favor of the receiver of the Detroit Bankers Company.

The assignment further recites [R. 40]:

> "The undersigned as receiver of Detroit Bankers Company further sells, assigns, conveys, transfers and sets over unto B. C. Schram, as receiver of First National Bank-Detroit, his successors and assigns, any and all right of the undersigned and/or Detroit Bankers Company to collect from the owners and/or holders of the capital stock of Detroit Bankers Company their ratable and proportionate part of the said assessment heretofore levied by the Comptroller of the Currency of the United States on May 16, 1933, upon the shareholders of First National Bank-Detroit."

The assignment of this particular right, as here indicated by the receiver of Detroit Bankers Company, conclusively establishes the fact that there was no existing right prior to that assignment in favor of the receiver of First National Bank-Detroit as a beneficiary third party, upon which he could have brought an action as upon an express written agreement, evidenced by Article IX-A. At this point it may be well to note further that in *Simons v. Groesbeck,* also known as *Backus v. Connolly* (1934), 268 Mich. 495, 256 N. W. 496, the Michigan Supreme Court, construing a Michigan contract, held:

> *"That the liability imposed upon the stockholders thereof* (Detroit Bankers Company) *by the provisions of its Articles of Association* (Article IX-A) *constituted an asset of the Detroit Bankers Company."*

And further held that upon the appointment of William F. Connolly as receiver of the Detroit Bankers Company:

> *"Defendant Connolly as such became entitled to all of the property and assets of the Detroit Bankers Company."*

And further held:

> *"Such liability was to be enforced by defendant Connolly as receiver of Detroit Bankers Company."*

It is true that the foregoing quotations were from the holdings of the trial court, but the Supreme Court of Michigan affirmed that judgment without qualification and said upon its own behalf in its holding:

> "This contractual stockholders' liability is just as much a trust fund for the benefit and protection of the creditors as the capital stock itself. One of the usual and ordinary duties of the receiver of an insolvent corporation *is to reduce its corporate assets to possession for the payment of the debts proved and established against it, and a receiver of the court ought not to be enjoined from the performance of a duty which the law imposes upon him.*"

The Court further said, quoting from other authorities:

> "As the stockholders' liability rests upon a contract entered into by himself, why should the receiver on the principle of comity not be permitted to sue in our courts upon that contract, just as he would be permitted to sue on a promissory note?"

And the Supreme Court of Michigan concludes its holding in the following words:

> "This superadded liability, fixed by the Articles of Association of the holding companies here concerned, constitutes a liability upon the part of the stockholders *and an asset upon the part of the corporation to be collected by the respective receivers therefor. Such receivers ought not be enjoined of their duty.*"

This decision was binding on appellant, and under it no action could be based on a third party claim by appellant, prior to the assignment, on Article IX-A. The rights under Article IX-A being the property of Detroit Bankers Company, appellant could not sue therefor prior to assignment.

The opinion of the Supreme Court of Michigan in *Simons v. Groesbeck, supra,* intervened between the time

of the rendition of the decision by the District Court in *Barbour v. Thomas* (1933), 7 Fed. Supp. 271, and the decision of the Circuit Court of Appeals in *Barbour v. Thomas* (C. C. A. 6, 1936), 86 Fed. (2d) 510 (cer. denied 300 U. S. 670, 81 L. ed. 877), all three of which cases directly concerned the relationship existing between First National Bank-Detroit shareholders, Detroit Bankers Company shareholders, and the several corporations, both in their statutory liabilities and the alleged contractual liabilities arising under Article IX-A. [There appears in the Appendix p. 19 a list of the cases relative to the affairs of Detroit Bankers Company.] The Circuit Court of Appeals, while affirming the District Court's judgment, *did so upon grounds far different from those actuating the decision of the District Court;* the Circuit Court of Appeals said (concerning this question of just where the right lay to recover from the shareholders of Detroit Bankers Company under Article IX-A) that the shareholders of Detroit Bankers Company

> "remained the real and beneficial stockholders (of First National Bank-Detroit) notwithstanding they had gone to the pretense of changing their unit shares for those of the holding company."

It is from this decision that appellant gets his thought that leads to his stating an action of statutory liability. It is true that the Court in *Barbour v. Thomas* says that each of those intervening petitioners, with approximately 9000 other shareholders of the holding company, had obligated themselves to pay their proportionate part of the assessment, but the Court was merely recounting the charges made by the receiver, Thomas, in the *Barbour v. Thomas* litigation, and were in no sense binding upon Barbour or the other 9000 shareholders of the holding company. To this the receiver, Connolly, answered that:

> "He only had a right to enforce the assessment and he likewise moved to dismiss the cross-bill or counterclaim."

The Circuit Court of Appeals further held in its decision:

> *"We have proceeded upon the assumption that the appellants were stockholders of the bank* (First National Bank-Detroit). They insist that they were not, that they had exchanged their certificates for those of the holding company, the stockholder of record."

The Court thereupon follows with a review of the authorities pertaining to the rule established in the federal court construing national bank laws and holding that the courts will in such cases look through corporate entity to ascertain who the actual, beneficial owners of the national bank stock are, and then concurs in the finding of the trial court that the appellants

> "are 'actual owners' of the stock of the bank upon which the assessment was levied. The stockholders never sold their stock. They simply exchanged it for holding company shares. The holding company certificates represented the interest which the shareholders of each unit held or acquired in the assets of the group."

and other like remarks pertaining to corporate entity and actual beneficial ownership. The Circuit Court of Appeals comes to a discussion of the decision of the state court in *Backus v. Connolly, supra,* and remarks that the Supreme Court of Michigan held:

> "That the holding company was the owner of the bank stock and liable to assessments there under both federal and state statutes that Article IX constituted an agreement between the holding company and its stockholders, enforceable by the receiver; and that they would be liable for the holding company's statutory liability. * * * *But the Court did not hold that an assessment under the federal statute was not enforceable against its stockholders as the real or actual owners of the bank stock. That question was*

not in issue and neither the Comptroller or the receiver was a party to that suit. We have no quarrel with the rule that, as between the stockholders of the holding company and its receiver, Article IX-A constitutes a contractual obligation."

All of which shows that that Court had in mind only the statutory liability action.

The Circuit Court of Appeals concludes its opinion with:

"But all this to one side. *We are applying a* FEDERAL STATUTE IN A SUIT BY THE RECEIVER OF A NATIONAL BANK TO ENFORCE THE PERSONAL LIABILITY OF ITS REAL SHAREHOLDERS *for the benefit of its creditors and depositors. From this viewpoint the insistence that Article IX-A was in violation of the national statute of frauds is unimportant. From the same reason the claim of cross-appellant Connolly, receiver, that he has the right to collect the assessment is foreclosed. The statute* (Title 12, Sec. 192, U. S. C., 12 U. S. C. A., Sec. 192 and note) *specifically vests this right in the receiver Thomas under the direction of the Comptroller."*

At the time of the rendition of the decision of the Circuit Court of Appeals in the *Barbour* case, the case of *Erie R. R. Co. v. Tompkins* (1938), 304 U. S. 64, 82 L. ed. 1188, 114 A. L. R. 1487, had not been decided. That decision was rendered January, 1938. Under the ruling laid down in that case the decision of the Supreme Court of Michigan in *Simons v. Groesbeck, supra,* interpreting Article IX-A became binding upon the federal court. Prior to that time it might have been possible for the appellant to have maintained an action in the federal court as a third party upon a contract expressly made and intended for such third party's benefit, notwithstanding the state court decision interpreting the contract. We do not concede that he stated such a cause of action herein, on the contrary he followed *Barbour v. Thomas,* but after the

Tompkins decision and *Simons v. Groesbeck, supra,* it was perfectly apparent that the only right to recover upon the alleged contract contained in Article IX-A rested with the receiver of the Detroit Bankers Company and appellant could not have stated a third party action to collect the assessment on the theory of his being the beneficiary under Article IX-A. It was after the decision in the *Tompkins* case and after the filing of the motion to dismiss herein, upon the ground that the statute of limitations had run, that the appellant herein awakened to the fact that he was in court without a cause of action. Hence the securing of the assignment from the receiver of the Detroit Bankers Company, and this assignment gave to the appellant herein, if any rights exist whatever under Article IX-A, an entirely new cause of action. After securing this assignment, appellant had an actionable interest in Article IX-A, and not before.

The wording of the assignment of the rights under Article IX-A forecloses any alleged claims to a prior right thereunder. It says:

> "It is the intention of the undersigned, by these presents, to release and assign unto B. C. Schram, as receiver of First National Bank-Detroit, his successors and assigns, any and all rights whatsoever which the said Detroit Bankers Company and/or the undersigned as receiver thereof may have or *assert in and to the aforesaid stock assessment levied by the Comptroller of the Currency* of the United States on May 16, 1933, *and/or the right to collect the same from the owners and/or holders of the capital stock of Detroit Bankers Company by virtue of any statute, contract, agreement, or otherwise,* including but not by way of limitation, the right to collect the aforesaid stock assessment against the shareholders of First National Bank-Detroit *by reason of the contract and agreement embodied in Article IX-A* of the Articles of Association of Detroit Bankers Company." [R. 42.]

The appellant herein, in his motion for leave to file a supplemental bill, attaches thereto the court proceedings had by the receiver of the Detroit Bankers Company in the Circuit Court of Wayne County, Michigan, and the decree of that Court authorizing the receiver to make the assignment [R. 44-55, incl.], and it will be noted that the earliest date upon any of these proceedings had in the Detroit Court was after the filing of the bill herein and after the *Tompkins* decision, to-wit, July 29, 1938.

We repeat, therefore, that by a review of all of the court proceedings in this extensive litigation, growing out of these Detroit bank failures, that it must be concluded, in view of the decision in *Barbour v. Thomas* by the Circuit Court of Appeals, *supra,* that the appellant, actuated by that holding, proceeded to ground his action upon a statutory liability; then when the defense of the statute of limitations was pled by appellee, appellant shifted his ground from an action on a statutory liability to an alleged action on a contract made for the benefit of a third party, but it later developed that this action could not lie in his favor under the ruling in *Simons v. Groesbeck* and that he was bound by that ruling by reason of *Erie Ry. Co. v. Tompkins;* however, in October, 1938, he resorts to securing the assignment of the rights of the receiver of the Detroit Bankers Company under Article IX-A; up to that time he had not and could not have, any contractual cause of action, his sole cause of action was on the statutory liability. For reasons hereinafter set out we will show that appellant cannot even now maintain an action on either the contract theory or statutory liability.

We next examine the bill of complaint to determine what appellant actually alleges and by the following quotation and the excerpts appearing in the appendix, pages 1 to 9, incl., we will show that the action is grounded on a statutory liability. He stated [R. 4] that the action is brought for the purpose of

> *"enforcement of the liability imposed by the laws of the United States,"*

against the defendant, Bertha H. Robertson, and, after recounting the levy of the assessment by the Comptroller of the Currency [R. 17-19], alleges that he, the receiver,

> "did make demand on each and every one of them for the par value of each and every share of the capital stock of said association held or owned by them respectively at the time of its failure."

He then recounts that he was directed by the Comptroller to take all necessary steps against the shareholders of the First National Bank-Detroit, by suit or otherwise, to enforce

> "the individual liability of said shareholders" [R. 18-19],

and further states:

> "Acting pursuant to authority and in obedience to the aforesaid directions of the Comptroller * * *, said * * * receiver of First National Bank-Detroit and the plaintiff as his successor, notified all the shareholders of said bank, including the defendant Bertha H. Robertson, the defendant named herein, of the fact that the Comptroller * * * did levy said assessment * * * and likewise made demand upon said shareholders for payment of said assessment, including Bertha H. Robertson."

It is not alleged in this bill of complaint that any demand was ever made upon Bertha H. Robertson to pay any sum of money to the appellant herein under any express written agreement. The only demand ever made upon her was that she, as a shareholder of First National Bank-Detroit, *pay the assessment levied upon its shareholders.*

Appellant, however, in his brief (App. Br. 2, 3), now claims that the appellee had, by "express written contract," "assumed and agreed to pay" the assessment levied on the shareholders of First National Bank-Detroit, and

further claims now that the action here is "an independent and separate contract cause of action," and that the obligation of appellee is on "an express written contract obligation on the part of the appellee to pay this stock assessment, separate from and independent of any statutory liability." Appellant now, in his effort to switch the cause of action as originally brought, from that of an action upon a statutory liability to an action on express written contract, devotes substantially the entirety of his brief to such purpose. The strenuous efforts made by the appellant to convince the Court that the action as laid is upon an express written agreement is shown by the character of the brief, and (App. Br. 4) he further claims, at the end of his introductory remarks:

> "While not necessary to sustain this suit by appellant on the contract of appellee, as shown by Smith and Leyda decisions, no valid reason exists for not permitting the contract phase of this suit to be *rounded out with the facts and information sought to be supplied to the District Court in appellant's supplementary bill of complaint.*"

We confess that we fail to see how he is going to "round out" something he never started, and if he had started a third party action, he had no foundation for it. Furthermore, the inference that he attempts to convey by referring to the *Smith* and *Leyda* decisions that they were based upon a bill of complaint of the same type as that involved here is entirely without warrant for there is nothing in this record to show what character of bill of complaint was filed in those two cases.

It is the contention of this appellee that the bill of complaint filed herein, with the character of allegations contained therein, places it distinctly on the ground that

the receiver of the national bank has a right to pursue the original stockholder of the national bank, in the collection of the assessment levied by the Comptroller, and that in doing so the Court will, in order to determine who is liable and the measure of liability, look through corporate entity and treat the holding company as having acted in the capacity of an agent or a mere instrumentality through which the original national bank stockholders, in order to serve their own ends, whether morally wrong or not, have by exchanging their stock for that of the holding company attempted to avoid their super-added liability. The allegations made in respect to this appellee, if not directly charging her with having accepted the stock of the Detroit Bankers Company in exchange for her alleged ownership of stock in First National Bank-Detroit in order to avoid the super-added liability, does, nevertheless, charge her with being the actual beneficial owner of 142.3850 shares of the capital stock of the First National Bank-Detroit [R. 20]. They have attempted, in the bill of complaint, to show that for her and her associate's own convenience, they by their exchange of stock, no matter what their motives, or what prompted their actions, attempted to effect by the several transactions leading up to the final result, the avoidance of the statutory liability. In other words, the pleader was attempting to bring the cause of action as alleged within the doctrine of such cases as the following:

Pauly v. State Loan & Trust Co. (1896), 165 U. S. 606, 623, 41 L. Ed. 844, 850;

Ohio Valley National Bank v. Hulitt (1906), 204 U. S. 162, 51 L. Ed. 423;

Laurent v. Anderson (C. C. A. 6, 1934), 70 Fed. (2d) 819;

Corker v. Soper (C. C. A. 5, 1931), 53 Fed. (2d) 190, 191, cer. den. 285 U. S. 540, 76 L. Ed. 933;

McDonald v. Dewey (1905), 202 U. S. 510, 50 L. Ed. 1128, 6 Ann. Cas. 419;

Germania Nat'l Bank v. Case (1879), 99 U. S. 28, 25 L. Ed. 448;

Houghton v. Hubbell (C. C. A. 1, 1899), 91 Fed. 453, 454.

It will also be noted that the Circuit Court of Appeals in *Barbour v. Thomas, supra,* in reviewing the case of *Simons v. Groesbeck, supra,* not at that time being bound by the doctrine laid down in *Erie R. R. Co. v. Tompkins, supra,* proceeded to act independently of the state court judgment. That Court said:

> "Appellants urge upon us the case of Backus v. Connolly, 268 Mich. 495, 256 N. W. 496, decided after the decree below."

and then refers to the purpose of that action and what the Supreme Court of Michigan had held, and then said:

> "The Michigan Supreme Court declined to hold it void, but *ruled that the holding company was the owner of the bank stock and liable to assessments thereon under both federal and state statutes. That Article IX constituted an agreement between the holding company and its stockholders enforceable by the receiver;* and that they would be liable for the holding company statutory liability. * * * *But the court did not hold that an assessment under the federal statute was not enforceable against its stockholders as the real or actual owners of the bank stock. That question was not in issue* and neither the Comptroller or the receiver was a party to that suit."

By this holding of the Circuit Court of Appeals the foundation was laid for appellant receiver to pursue the statutory liability, and it would manifestly be preferable to the receiver of the national bank to himself pursue the stockholders to collect the assessment than to pursue the receiver of the actual insolvent stockholder and await his ability to collect. The defense, however, of the statute of limitations in this case necessitated an immediate change of front.

It may be well to state here at this time that upon there coming in to this cause the defense of the statute of limitations (Section 359, California Code of Civil Procedure [Appendix, p. 18]), supported by the holding of this Court in *Johnson v. Green* (C. C. A. 9, 1937), 88 Fed. (2d) 638, it was perfectly apparent to the appellant that the cause of action on the statutory liability was lost and that Section 351 of the California Code of Civil Procedure [Appendix, p. 18], to-wit, the absence from the state statute, would not save the cause of action since Section 359 of the Code of Civil Procedure, which provides the three year limitation, is not affected by reason of the absence or presence in the state of California of the defendant for the full period of time, as provided for in the limitation statute, but the limitation period as provided in Section 337 of the California Code of Civil Procedure, which relates to contracts, is affected by Section 351, therefore, if this cause of action could be switched from that of an action upon a statutory liability to an action upon express written contract, then Section 337 of the California Code of Civil Procedure will apply, and since the appellee herein had only resided in the state about six months at the time of the filing of the bill, that

statute would not be available to her. This entire question is more fully covered hereinafter.

We now turn to the consideration of the allegations in the bill of complaint that bear upon our theory that this cause of action is based upon a statutory liability, and, in this connection, we call to the Court's attention the phraseology of the bill of complaint, the particular points brought to the attention of the Court and the scrupulous anxiety shown by the pleader in his effort to make it clear to the Court that this exchange of First National Bank-Detroit shares for the shares of Detroit Bankers Company was all a pure sham, all of which goes to the confirmation of appellee's theory upon which this cause of action was actually founded. That was unquestionably the ground of the decision of the trial court, and that accordingly the plea of the statute of limitations was a good defense, and further that there was nothing left before the Court in aid of which a supplemental bill could have been filed, and if there was, that the supplemental bill in itself could not have been filed since it was bringing in an entirely new cause of action.

For the convenience of the Court, we insert in the Appendix attached hereto [pp. 1 to 9, incl.] excerpts from the bill of complaint which conclusively show, as we claim, that this bill of complaint was grounded upon the theory of statutory liability only.

Appellee has made this review of what she believes to be the true cause of action before the Court, that we may have clearly defined what kind of a lawsuit is before the Court. But if appellee is in error in this particular, then for other reasons hereinafter set out, appellant cannot maintain an action against this appellee upon any ground.

OUTLINE OF ARGUMENT.

Since the appellant now seeks to have the alleged cause of action construed as one "upon an express written contract to pay her ratable and proportionate part of the assessment levied by the Comptroller of the Currency" (App. Br. 15), and since he insists that the alleged cause of action as stated is upon an "express written contract," and is "separate and distinct from and independent of any liability created by law to pay the appellant his or her ratable and proportionate part of any assessment" (App. Br. 15), the appellant will, by reason of this change of position, if successful, be thereby enabled to foreclose the benefits appellee would be entitled to under her plea of the *California Statute of Limitations (Section 359, Code of Civil Procedure)* and the appellee would thereby be put in the position of where the only statute of limitations available to her under the California Code would be entirely nullified, not because of want of lapse of time (nearly five years has intervened between the due date of the assessment and the date of the filing of the bill of complaint) but because of the absence from the state of California of appellee, in which case *Section 351 of the California Code of Civil Procedure* would become operative, whereas, if the action is one based on a liability created by law the non-residence statute, to-wit, *Section 351 of the California Code of Civil Procedure*, is not operative as against *Section 359 of the Code of Civil Procedure.*

In view of the foregoing situation, the question here involved resolves itself largely into the kind of a cause of action stated by the appellant.

The appellant's brief virtually amounts to an admission that if the cause of action as stated is upon a liability created by statute, the appellee's defense is good and it must be held that the District Court did not err in sustaining appellee's motion to dismiss and for judgment. However, if the cause of action as stated by the appellant

is upon an "express written contract," or is a cause of action upon both an "express written contract" and a liability created by law, and the appellant is obliged to elect which remedy he will pursue, it will naturally follow that by reason of the character of the alleged defense now interposed by the appellee he will elect to pursue the action as based on contract, in which event the appellee is confronted with the further question of whether the facts as plead in the bill of complaint are such as in law constitute an action upon contract, or whether there is any such contract right available to appellant as will enable him to state a cause of action on contract, or whether there is any contract at all. By reason of the contention of the appellant, we have not only before the Court at the present time the question of the appellee's defense of the statute of limitations, but the further questions pertaining to what, if any, cause of action appellant has or could state upon the alleged contract right, and in this connection the appellee contends:

POINT I.

The original bill filed herein is not based upon an "express written contract," but is based upon a "liability created by law."

POINT II.

The alleged "express written contract," of which the appellant claims to have availed himself in the bill of complaint, is based upon Article IX-A of the Articles of Association of the Detroit Bankers Company. Such article cannot form the basis of an action by the appellant to collect from an alleged bank shareholder the superadded liability as provided for by the Act of Congress and the assessment levied herein. Article IX-A is not binding upon the appellant herein and cannot be adopted by the appellant as a basis for a cause of action without overriding, interfering with, impeding, and curtailing the Act of Congress as evidenced in the National Bank Act.

Point III.

Article IX-A, if it constitutes an obligation of appellee, is a promise to do a thing that the appellee, if she be a shareholder in First National Bank-Detroit, is already, by the provisions of the statutory law, legally bound to do, and the alleged agreement evidenced by Article IX-A is *nudum pactum* and cannot form the basis of an action.

Point IV.

The bill of complaint, as it now stands, if it be based upon the alleged contract, must of necessity be on the theory that alleged contract expressed in Article IX-A was made as between two parties for the benefit of many third parties, to-wit, the appellant and creditors of 25 other banks.

(a) No such contract could be made pertaining to the measure of the powers of a receiver of a national bank.

(b) It is not shown by pleading or otherwise that the alleged contract, as plead, was made for or intended for the benefit of the appellant receiver herein. On the contrary, it has been distinctly held by the Supreme Court of Michigan, in a decision binding upon this Court, in *Simons v. Groesbeck, supra,* that any right of action arising under that contract is vested in the state receiver of the Detroit Bankers Company and can only be exercised by him. The right under Article IX-A is an asset of Detroit Bankers Company exclusively.

(c) The bill of complaint fails to state a cause of action upon a contract entered into and intended as and for the benefit of a third party.

(d) Article IX-A is but a repetition of the statutory liability. The statutory liability is not assignable.

(e) The appellant receiver cannot, without violating the Act of Congress, substitute a nebulous right arising under the alleged contract for and in the place of the more certain right and duties given to him by the Act of Congress.

Point V.

Appellant is guilty of laches and is not entitled to any relief upon either the contract theory or the theory of a liability created by law.

Point VI.

The action herein is upon "a liability created by law," and such action, both as to the remedy and the right of action, is barred under *Section 359, California Code of Civil Procedure.*

(a) *Section 359, California Code of Civil Procedure,* is a conclusive defense to the action.

(b) *Section 351, California Code of Civil Procedure,* has no bearing on the right of this appellee arising under *Section 359, California Code of Civil Procedure.*

(c) *Section 359, California Code of Civil Procedure,* is a limitation statute of the character that, as to any action brought in California to enforce a stockholder's super-added liability, bars both the remedy and the right.

(d) The alleged contractual liability under Article IX-A ceased to exist as a right upon which a cause of action could be based concurrently with the ceasing to exist of the right to pursue a remedy based upon a statutory liability.

Point VII.

The District Court did not err in denying appellant leave to file the supplemental bill of complaint. That question is not reviewable here.

Point VIII.

This Court, sitting as a court of equity, is without jurisdiction to try this action as an equitable cause of action, to the exclusion of appellee's right to a jury trial. Appellee is entitled to try this action upon the principles governing actions at law.

ARGUMENT.

POINT I.

The Bill of Complaint Is Grounded on a "Liability Created By Law."

Appellee has heretofore, in her "statement of the case," covered much of the matter pertaining to this point. She gives attention here, however, to answering appellant's contentions covered in his argument. (App. Br. 17-56, incl.)

It is admitted that the appellee is not the record owner of First National Bank-Detroit stock; that she is the record owner of 1013 shares of Detroit Bankers Company stock; that such company is not a banking corporation, but organized exclusively as a holding company.

Schram v. Poole (C. C. A. 1938), 97 F. (2d) 566.

What may have been the motive that actuated the organization of the holding company or the incorporation in its Articles of Association of Article IX-A is not a material question if this is an action upon an express written contract, but if the action is upon a liability created by law, then the motive of organizing the holding company and the motive in incorporating Article IX-A becomes very material, since such matters, and many other facts alleged in the bill of complaint, all go directly to the question of whether the appellee and others in her position are the actual, beneficial owners of First National Bank-Detroit stock, and to enable the Court to look through corporate entity to the purpose that lay behind the organization of the corporation, the motive and scheme as devised by the organizers of the holding company. The Comptroller of the Currency and his receiver of the First National Bank-Detroit were in no way bound by what the corporate organizers or the officials of the State of Michigan may have done incident to the organization of the holding company. The Comptroller of the Currency and his receiver have certain defined powers and duties

under the national bank act and by reason of numerous federal court decisions it has become a well established rule of law that national bank shareholders cannot evade their super-added liability by the organization of and transfer to a holding company or to a trustee of their national bank shares.

Metropolitan Holding Co. v. Snyder (C. C. A. 8, 1935), 79 F. (2d) 263, 103 A. L. R. 912;

Nettles v. Rhett (C. C. A. 4, 1938), 94 F. (2d) 42;

Laurent, Receiver v. Anderson, Receiver (C. C. A. 6, 1934), 70 F. (2d) 819.

The problem that confronts the appellant herein in the performance of his statutory duty in the collection of the assessment levied by the Comptroller of the Currency is not only definitely defined by the Act of Congress, but by a long line of federal decisions dealing with exactly similar situations. If the receiver abandoned the usual course of procedure of following the original stockholder, the appellant receiver waived and forfeited a valuable right, which it is quite impossible to believe that the receiver did do or intended to do. An action to collect the liability created by law, would be directed against the very limited number of stockholders of First National Bank-Detroit, whereas, if the action is an action on contract, then the amount of the shareholders' liability is, as to each of them very materially reduced, and the receiver instead of having the exclusive right to follow the shareholders of the First National Bank-Detroit on their statutory liability, he becomes one among 25 other unit banks, each of which, through its receiver, would, upon the contract theory, be pursuing all of the 9000 shareholders of Detroit Bankers Company. It is stated in *Barbour v. Thomas* (C. C. A. 6, 1936), 86 F. (2d) 510, that there were approximately 9000 shareholders at that time, to-wit, 1936, in the Detroit Bankers Company, and that all of these shareholders had been original shareholders in one

or more of 25 other banks or trust companies. [R. 14-15.] Furthermore, the Supreme Court of Michigan, in *Simons v. Groesbeck* (1934), 268 Mich. 495, 256 N. W. 496, in construing Article IX-A, held that the right of action given by virtue of that Article lay exclusively with Connolly, the state court receiver of the Detroit Bankers Company, and further held, page 501:

> *"The liability imposed upon the stockholders* thereof *by the provisions of its Articles of Association, constituted an asset of the Detroit Bankers Company.* That the Detroit Bankers Company became legally liable under the national banking act to the receiver of the First National Bank-Detroit to an assessment of 100% of the par value of the capital stock of the First National Bank-Detroit held by it."

And that Court further held, page 501:

> *"Such liability was to be enforced by defendant Connolly, receiver of Detroit Bankers Company."*

That decision has, by reason of the decision of the Supreme Court in *Eric Ry. Co. v. Tompkins* (1938), 304 U. S. 64, 82 L. ed. 1188, 114 A. L. R. 1487, become binding upon this Court. It is quite inconceivable of how, under these holdings appellant can state any action on the contract theory.

At the time of the rendering of the decision in *Barbour v. Thomas, supra,* the case of *Eric Ry. Co. v. Tompkins, supra,* had not been decided, hence the Circuit Court of Appeals in the *Barbour* case did not feel itself bound by the Supreme Court of Michigan in *Simons v. Groesbeck, supra.* However, in *Barbour v. Thomas, supra,* there was before the Circuit Court of Appeals a claim by the receiver Connolly in his answer, that:

> *"He, only, had a right to enforce the assessment."*

The Circuit Court of Appeals had urged upon it the holding of the Michigan Supreme Court in the case of *Simons v. Groesbeck, supra,* and it was there claimed that the Michigan court had held:

> "The holding company was the owner of the bank's stock (First National Bank-Detroit) and liable to assessment thereon under both federal and state statutes; *that Article IX constituted an agreement between the holding company and its stockholders, enforceable by the receiver."* (The state court receiver of Detroit Bankers Company.)

The Circuit Court of Appeals in *Barbour v. Thomas, supra* (also entitled *Backus v. Connolly*), by its opinion, clearly indicates the underlying principle of law that it was relying on when it follows up the remarks concerning the state court decision, as follows, page 517:

> "But the court (Michigan Supreme Court) *did not hold that an assessment under the federal statute was not enforceable against its stockholders* AS THE REAL OR ACTUAL OWNERS OF THE BANK STOCK." (First National Bank-Detroit stock.)

The Circuit Court of Appeals further said, page 517:

> "We have no quarrel with the ruling that as between the stockholders of the holding company and its receiver Article IX-A constitutes a contractual obligation. It seems to us that this 'super-added' liability (Backus v. Connolly, *supra*) imposed by the stockholders upon themselves, constitutes ADDITIONAL EVIDENCE THAT THEY REGARDED THEMSELVES IN THEIR RELATIONSHIP TO THE CREDITORS AND DEPOSITORS OF THE BANK (First National Bank-Detroit) AS THE TRUE AND REAL OWNERS OF ITS STOCKS."

And the Court further said, page 518:

> "But, all this to one side, *we are applying a federal statute in a suit by the receiver of a national bank to enforce the personal liability of* ITS REAL SHAREHOLDERS FOR THE BENEFIT OF ITS CREDITORS AND DEPOSITORS."

And the Court further said, page 518:

> "From the same reason *the claim of cross-appellant receiver that he has the right to collect the assessments is foreclosed.* THE STATUTE (Title 12, Section 192, U. S. C.) (12 U. S. C. A. 192 and Note) SPECIFICALLY VESTS THIS RIGHT IN RECEIVER THOMAS UNDER THE DIRECTIONS OF THE COMPTROLLER."

It is very apparent that the Circuit Court of Appeals was *talking about the statutory right,* not *the contractual right.* That Court was grounding its entire line of thought on the theory that Thomas was attempting to pursue the methods ordinarily used in the collection of a national bank assessment. The Court had in mind the thought that national bank receivers, in the collection of an assessment, determine who are the actual and beneficial owners of the national bank stock and in reaching such a conclusion they get the cooperation of the courts by their looking through corporate entity.

Up to this time there had been two lines of thought pursued; one in the federal court to the effect that it, the federal court, was not bound by any contractual theory of the collectibility of the national bank assessment. The other theory was that of the state court that the national bank assessment ran only against the Detroit Bankers Company, the record shareholder, and that Article IX-A was exclusively for the benefit of the receiver of the Detroit Bankers Company, and that it (IX-A) constituted an *"asset of the Detroit Bankers Company."* The national bank receiver at that time had no title to this asset. The *right to collect thereon was vested in the receiver of the state holding company,* and that situation forestalled appellants stating a cause of action on Article IX-A as a beneficiary. That was an exclusive asset of Detroit Bankers Company under its exclusive control, to the end that it could recoup its liability upon its numerous

corporate stock holdings. The Circuit Court of Appeals in the *Barbour* case said, page 518:

> "We are APPLYING A FEDERAL STATUTE IN A SUIT BY THE RECEIVER OF A NATIONAL BANK TO ENFORCE THE PERSONAL LIABILITY OF ITS REAL SHAREHOLDERS FOR THE BENEFIT OF ITS CREDITORS AND DEPOSITORS."

Had the Circuit Court of Appeals, at that time, been grounding its opinion of the right of a national bank receiver to collect on this alleged "express written contract", it would have been necessary only for it to recite the fact that such express written contract existed, that it was the basis of the action, that the national bank receiver had the right to sue thereunder, and that he was accordingly claiming the benefits thereof, either as an assignee, which he was not at that time, or as a third party for whose benefit the contract had been entered into. The Circuit Court of Appeals, however, instead of stating that it was pursuing any such thought, says, page 518:

> "ALL THIS TO ONE SIDE."

We are pursuing, under a federal statute, the "real shareholders" of the national bank.

After the decisions in *Simons v. Groesbeck, supra,* and *Erie Ry. Co. v. Tompkins, supra,* and, *Barbour v. Thomas, supra,* it was made clear that there was no asset value in Article IX-A that was vested in or could be vested in the national bank receiver upon which he could have grounded an action.

It is the contention of this appellee that the pleader, in drafting the bill of complaint herein, had in mind the ruling in *Barbour v. Thomas, supra,* and of the Supreme Court of Michigan in *Simons v. Groesbeck, supra,* and attempted to state a cause of action on the theory that he was collecting a statutory liability. The appellee filed an answer based upon that theory. Subsequently the appellee amended her answer, setting up the California Statute

of Limitations and then filed a motion to dismiss. Under the holding of this Court in *Johnson v. Green* (C. C. A. 9, 1937), 88 F. (2d) 638, it was apparent to the appellant that the cause of action was a lost cause, if based upon a statutory liability. It was likewise apparent to the appellant that if he could avail himself of his allegations concerning Article IX-A (mere explanatory allegations used as laying the foundation for the pursuit of the national bank shareholders as the actual and beneficial owners), then the action could be based upon the theory that they were pursuing a contractual right and not the statutory liability, and if a supplemental bill could be filed showing the assignment of this alleged contractual right, then in such event the cause of action could be saved and a new cause of action stated, based upon Article IX-A. This conclusion is established by the fact that appellant is trying now, as he claims, in his brief (App. Br. 4), that while the supplemental bill is not necessary to sustain his suit on the contract theory, yet no valid reason can exist "for not permitting the contract phase of this suit to be *rounded out* with the facts and information sought to be supplied" by the supplemental bill.

It will be noted from the exhibits attached to appellant's motion for leave to file supplemental bill [R. 39-54, incl.], that the receiver of the Detroit Bankers Company, in his petition filed in the Circuit Court of Wayne County, Michigan, on or about July 29, 1938 [R. 45-55] and after the filing of the complaint herein, sought leave to compromise many questions in controversy between him as the receiver of the Detroit Bankers Company and the receiver of First National Bank-Detroit. This all upon a basis of a proposed settlement, and that by the terms of this "proposed settlement" [R. 46, 47], to-wit, the dismissal by the First National Bank-Detroit receiver of the bankruptcy proceedings against the Detroit Bankers Company, the receiver of the Detroit Bankers Company

would transfer to the national bank receiver all shares of the First National Bank-Detroit held by the Detroit Bankers Company, *as custodian for the shareholders of the Detroit Bankers Company,* and:

> "at the same time, your petitioner is to assign to the receiver of First National Bank-Detroit *all his right to collect from the shareholders of the Detroit Bankers Company any and all stock assessments levied upon shareholders of First National Bank-Detroit.*"

The appellant, upon accepting the benefits of that petition and the judgment of the court authorizing the compromise [R. 44], *thereby estopped himself to now claim that prior to such assignment* (which was made on the 6th day of October, 1938) [R. 39-43, incl.], *he had any right of any character whatsoever to collect from or sue for any liability or obligation of the Detroit Bankers Company shareholders arising by reason of Article IX-A. The appellant receiver herein could not, prior to October 8, 1938, state a cause of action of any character whatsoever against Detroit Bankers Company shareholders based upon Article IX-A.* The appellant herein is further estopped, by reason of his acceptance of certain other benefits under this petition [R. 50] for compromise and by the decree of the court, in that it was provided in the petition for compromise that there was to be paid to the appellant, as receiver, the stock assessment liability upon 728 shares of Detroit Bankers Company stock standing in the name of Warhan & Company, and further provided that there was to be paid a stock assessment liability upon 37 shares of Detroit Bankers Company stock standing in the name of Donald N. Sweeney, as nominee, and upon 250 shares of Detroit Bankers Company standing in the name of Warham & Company, as nominee. Ostensibly the Detroit Bankers Company receiver was in possession of the money collected upon these various shares from Detroit Bankers Company stockholders, or by reason of his receivership was in a position to command the payment. In any

event, the *acceptance of such benefits was an acknowledgment by the appellant that the power to make these collections rested with the Detroit Bankers Company receiver.* In the face of this course of conduct by the appellant herein, it seems quite illogical for the appellant now to claim that he could and did state a cause of action upon this express written contract prior to his securing an assignment of the contract.

The questions raised by the appellant (App. Br. 21, 22), to-wit, consideration, due execution of the agreement, and its binding effect (App. Br. 23-34, incl.), and his reference to the decision in *Barbour v. Thomas, supra,* as supporting his claim (and in this connection it will be noted that appellant devotes a very considerable part of his brief to quoting from the opinion of the lower court in *Barbour v. Thomas, supra,* and gives only minor consideration to the decision of the Circuit Court of Appeals (App. Br. 31-34). It may also be said here that while the Circuit Court of Appeals affirms the decision of Judge Hayes, it bases its decision upon quite different grounds). Appellant quotes most unfairly from the opinion of the Circuit Court of Appeals. He quotes from page 515 of that opinion (App. Br. 31, 32) but fails to quote a very material part of the opinion, and the part that is left out, when added to what is quoted, gives to the quotation a very different meaning. The appellant, at page 32, quotes:

> "He (the receiver) further alleged that the stockholders of the bank * * *"

And then quotes an additional part of the opinion. Where these asterisks occur there should have been incorporated the following matter which goes to show that the Circuit Court of Appeals had in mind the pursuit of a right arising under a statutory liability and not that under a contract. The appellant omits the following, to-wit:

> "And trust companies, in order to assure depositors and creditors that they (the original shareholders of First National Bank-Detroit) REMAINED THE REAL

AND BENEFICIAL STOCKHOLDERS NOTWITHSTANDING THEY HAD GONE TO THE PRETENSE OF CHANGING THEIR UNIT SHARES FOR THOSE OF THE HOLDING COMPANY."

By adding the foregoing quotation to the paragraph as quoted partially by the appellant, a very different purpose is disclosed, namely, that while the receiver of the national bank was claiming that the shareholders of the Detroit Bankers Company had voluntarily obligated themselves under Article IX-A, yet they had attempted to evade the liability by such method.

The appellant again (App. Br. 32, 33) extensively quotes from the opinion of the Circuit Court of Appeals, but again omits a very vital part of the opinion, to-wit:

> "The Michigan Supreme Court declined to hold it void, *but ruled that the holding company was the owner of the banks' stock (First National Bank-Detroit and other banks) and liable to assessments thereon under both federal and state statutes; that Article IX constituted an agreement between the holding company and its stockholders enforceable by the receiver;* AND THAT THEY WOULD BE LIABLE FOR THE HOLDING COMPANY STATUTORY LIABILITY. The holding company was of course the record owner of the stock of the bank as listed with its president and cashier (U. S. C. Title 12, Sec. 62 (12 U. S. C. A. Sec. 62) *but the court did not hold that an assessment under the federal statute was not enforceable* AGAINST ITS STOCKHOLDERS AS THE REAL OR ACTUAL OWNERS OF THE BANK STOCK. THAT QUESTION WAS NOT IN ISSUE AND NEITHER THE COMPTROLLER NOR THE RECEIVER WAS A PARTY TO THAT SUIT."

The appellant then follows this omitted part of the quotation with another part of the opinion of the Circuit Court of Appeals (App. Br. 33), beginning with "We have no quarrel with the ruling," etc.

The omitted part of this opinion of the Circuit Court of Appeals shows conclusively that that Court was con-

sidering the statutory liability and its enforceability against the "real or actual owners of the banks' stock", and not the alleged right as claimed by appellant to enforce the alleged contractual obligation.

Again, the appellant (App. Br. 33) fails to give the decision of the Circuit Court of Appeals the interpretation to which it is entitled by omitting the concluding part of the opinion. The Court said, page 518:

> "ALL THIS TO ONE SIDE. WE ARE APPLYING A FEDERAL STATUTE IN A SUIT BY THE RECEIVER OF A NATIONAL BANK TO ENFORCE THE PERSONAL LIABILITY OF ITS REAL SHAREHOLDERS FOR THE BENEFIT OF ITS CREDITORS AND DEPOSITORS. FROM THIS VIEWPOINT THE INSISTENCE THAT ARTICLE IX-A WAS IN VIOLATION OF THE MICHIGAN STATUTE OF FRAUDS IS UNIMPORTANT.
>
> "FROM THE SAME REASON THE CLAIM OF CROSS-APPELLANT CONNOLLY, RECEIVER, THAT HE HAS THE RIGHT TO COLLECT THE ASSESSMENTS IS FORECLOSED. THE STATUTE (TITLE 12, SEC. 192 U. S. C. (12 U. S. C. A. AND NOTE) SPECIFICALLY VESTS THIS RIGHT IN RECEIVER THOMAS UNDER THE DIRECTION OF THE COMPTROLLER. See Richmond v. Irons, 121 U. S. 27, 49, 7 S. Ct. 788, 30 L. ed. 864, and Forrest v. Jack, *supra*."

A review of the authorities cited by the Circuit Court of Appeals supporting the last above quotation, conclusively show that the Circuit Court of Appeals was dealing with the question entirely as a statutory liability under Section 5151 of the Revised Statutes. The Supreme Court said in the cited case, *Richmond v. Irons, supra,* at page 50:

> "In the case of involuntary liquidation under the supervision of the Comptroller of the Currency, the receiver appointed by him is authorized and required, not only to collect and apply the proper assets of the bank to the payment of its debts, but also, so far as may be necessary, to enforce the individual liability

> of the shareholders. It thus appears that the enforcement of this liability is a part of the liquidation of the affairs of the bank; at least so closely connected with it as to constitute but one continuous transaction. * * * The intention of Congress evidently was to provide ample and effective remedies in all the specified cases for the protection of the public and the payment of creditors, by the application of the assets of the bank and the enforcement of the liability of the stockholders."

Appellant further says (App. Br. p. 34):

> "Not only has the existence of this definite contract obligation of appellee to pay the First National Bank-Detroit stock assessment been settled by Barbour v. Thomas, *supra,* but this Court, the 9th Circuit Court of Appeals, itself, had occasion less than two years ago to answer this question."

The appellant then takes up *Schram v. Smith* (C. C. A. 9, 1938), 97 Fed. (2d) 662, and *Schram v. Leyda* (C. C. A. 9, 1938), 97 Fed. (2d) 665.

We respectfully disagree with the appellant's contention that *Barbour v. Thomas, supra,* settled that the appellee and other stockholders of the Detroit Bankers Company are obligated to pay the assessment as a contract obligation. *What the Circuit Court of Appeals did hold in that case was that the Supreme Court of Michigan had held, as between the Detroit Bankers Company and its stockholders there was a contract obligation to pay the assessment, enforceable by the Detroit Bankers Company receiver.* It distinctly said that it was applying

> "a federal statute in a suit by a receiver of a national bank to enforce the personal liability of its real shareholders for the benefit of its creditors and depositors. * * * The statute * * * specifically vests this right in receiver Thomas under the direction of the Comptroller."

This language conclusively shows that the Circuit Court of Appeals, in *Barbour v. Thomas, supra,* was not concerned with the thought of collecting on the contract liability. It is only concerned with the enforcement of a federal statute to collect the assessment from the real shareholders of the national bank. There is nothing in this opinion that would justify an action by the receiver of the national bank based upon the contract theory.

Appellant, in discussing *Schram v. Smith, supra,* and *Schram v. Leyda, supra* (App. Br. 34), says, concerning these cases, that the same facts and the same manner of pleading them was there followed as here. The record here does not so disclose. We have no means of knowing what allegations or manner of making the same was followed in those cases.

However, those decisions are not in point here. In those cases, and in the case of *Schram v. Poole* (C. C. A. 9, 1938), 97 Fed. (2d) 566, it was contended by the defendant stockholder that the provisions of Article IX-A created no liability independent of the liability created by the National Bank Act, this Court, in view of the defendant stockholders basing their entire argument on that theory, reached the conclusion that they were separate rights, held that there was nothing left for this Court to do but to hold in accordance with the contention of the national bank receiver. In short, it appears from the decision of this Court in the *Poole, Smith,* and *Leyda* cases, that this Court did not have before it in those cases the same questions as are raised here. We believe that those decisions are distinguishable from the case here; there are points and questions raised here that were not raised or considered in those cases; but since the above decisions there has arisen a further reason why this Court should affirm the judgment below; there is now very respectable authority to the effect that even if

the action is based upon contract, *yet it is nevertheless subject to the bar of the statute of limitations;* in this particular the following authority raises a point that has not been considered in any of this Detroit bank litigation coming to the knowledge of this appellee.

In *Schram v. Cotton* (June, 1939, N. Y. Supreme Ct., App. Div.), 12 N. Y. Supp. (2d) 918 [reviewed in appendix p. 9], it was contended on the plaintiff's motion for summary judgment that:

> *"The plaintiff disclaimed any purpose to enforce the defendant's alleged statutory liability against which it is conceded the statute of limitations has run, and asserted only a claim on her contractual obligation to pay her proportion of the assessment against the holding company."*

The trial court had sustained the plea of the statute of limitations, a statute of limitations which, as it formerly stood, furnished the basis for our *Section 359* of the *California Code of Civil Procedure*. The plaintiff in the *Cotton* case contended that the action was on contract and that by reason thereof a six year statute applied. The Court, in its conclusion, page 920, says:

> "By the contract the defendant agrees to be liable for her share of any statutory liability imposed upon this corporation (the holding company) by reason of its ownership of the shares of the capital of any bank or trust company, *but that undertaking is qualified by the provision that it may be* ENFORCED IN THE SAME MANNER AND TO THE SAME EXTENT AS STATUTORY LIABILITY MAY NOW OR HEREAFTER BE ENFORCEABLE AGAINST STOCKHOLDERS OF BANKS OR TRUST COMPANIES UNDER THE LAWS UNDER WHICH SAID BANKS OR TRUST COMPANIES ARE ORGANIZED OR OPERATE. THE CONCLUSION IS UNAVOIDABLE THAT IN SO PROVIDING THE STOCKHOLDERS OF THE HOLDING COMPANY INTENDED THAT THE ENFORCEMENT OF THESE CONTRACTUAL RIGHTS SHOULD BE SUBJECT TO THE

SAME RESTRICTIONS, INCLUDING ANY LIMITATIONS AS TO TIME, AS THE STATUTORY LIABILITY OF THE CORPORATIONS WHICH THEY CONTRACTED TO PAY."

The New York Court then reviews *Schram v. Smith, supra,* and says:

"THAT DECISION PROCEEDS EXCLUSIVELY UPON THE THEORY THAT THE LIABILITY IS CONTRACTUAL IN CHARACTER AND DISREGARDS, AS IT SEEMS TO US, THE LIMITATIONS IMPOSED BY THE PROVISIONS OF THE CONTRACT."

The foregoing ruling is unquestionably sound. It is provided by Article IX-A that the holder of Detroit Bankers Company stock is to be held liable under that contract:

"For any statutory liability imposed upon this corporation by reason of its ownership of shares of the capital stock of any bank,"

and the stockholder of the Detroit Bankers Company, by the acceptance of such shares, thereby agrees:

"THAT SUCH LIABILITY MAY BE ENFORCED IN THE SAME MANNER AND TO THE SAME EXTENT AS STATUTORY LIABILITY MAY NOW OR HEREAFTER BE ENFORCEABLE AGAINST STOCKHOLDERS OF BANKS."

In other words, if the contract obligation is enforceable at all by the appellant receiver (and certainly he cannot enforce it as a third party) such contract obligation must be enforced in keeping with all of the terms of that agreement and not just such parts of the agreement as are most favorable to the receiver. In fact, that agreement provides that it can only be enforced

"In the same manner and to the same extent as statutory liability may now or hereafter be enforceable against stockholders of banks."

In other words, the stockholders of the Detroit Bankers Company, by accepting the certificates of stock and there-

by binding themselves to a performance of the obligation contained in Article IX-A, expressly reserve to themselves the right to plead, as against any action brought against them, upon that contract, any defense to the contract action that he could have plead were the action brought upon a statutory liability. *It is only enforceable "in the same manner and to the same extent as" the statutory liability.*

The appellant must of necessity accept that contract in the entirety of its terms and in the manner in which it was written.

It is not an uncommon practice to incorporate in contracts provisions limiting the time in which actions may be brought. The fact that there may be a statutory limitation period as pertaining to a right of action does not debar the contracting parties from the right to agree between themselves that a lesser time shall be applied or a greater time shall be applied as they in their judgment choose to make the contract.

Beeson v. Schloss (1920), 183 Cal. 618, 622, 192 Pac. 292;

Missouri, Kansas & Texas R. R. v. Harriman Bros. (1912), 227 U. S. 657, 672, 57 L. Ed. 690, 698;

Tebbetts v. Fidelity & Casualty Co. (1909), 155 Cal. 137, 139, 99 Pac. 501;

Adams v. Standard Accident Ins. Co. (1932), 124 Cal. 393, 12 Pac. (2d) 464.

If a party may, by agreement, waive the right to plead the statute of limitations as to all of the time, there certainly can be no objection to his right to waive the right to plead a part of the time.

It is admitted by the appellant (App. Br. 42, 43) that the alleged contractual liability is dependent upon a con-

dition precedent, namely, that there be an assessment levied by the Comptroller of the Currency, that the measure of the liability under the contract is the same as that under the statute, and then he contends that this does not detract from the separate and distinct nature of the two liabilities. Unquestionably there may be two separate and distinct liabilities for one obligation, namely, a statutory liability and a contractual one. As said in *Simons v. Groesbeck, supra,* page 506:

> "Stockholders can agree that an assessment can be levied on their stock; they may voluntarily assess themselves."

There is no fault to be found with this as a proposition of law, but when it comes to the promisee's availing himself of the rights existing in his favor by virtue of the stockholders' agreement, then in such event all of the terms and conditions of that agreement must be observed.

Upon examination, Article IX-A [R. 11, 12] provides, in the first instance, that the holder of stock of the holding corporation is individually and severally liable *for his proportionate part of any statutory liability imposed upon the holding company* by reason of its ownership of shares of the capital stock of any bank; they severally agree:

> "That *such liability may be enforced in the same manner and to the same extent as statutory liability may now or hereafter be enforceable* against stockholders of banks or trust companies under the laws under which said banks or trust companies are organized to operate."

In other words, the liability that the stockholder has assumed by this agreement is an obligation enforceable in the same manner and to the same extent as the statutory liability provided for under the National Bank Act. It would be entirely unreasonable to give to this provision of this alleged agreement the interpretation that the manner of the statutory enforcement and the extent of its enforcement runs only in favor of the receiver of the national bank. If the stockholder is stepping into the shoes of the record obligor stockholder, he does so for all purpose and subject to all the rights and all the benefits that he would have been entitled to had he been the original record stockholder, the wording of the agreement puts him in that position.

It may also be stated here that if the appellant's cause of action is based both upon contract and statutory liability, it certainly ignores elementary rules of pleading. No pleader would ever state two separate causes of action in the same complaint without separately stating and numbering them. And if he were stating solely a cause of action upon express agreement, as claimed, he certainly would not allege facts that would entitle him to recover upon an entirely different theory. When this pleading is examined with care, it will be apparent that the pleader has started wrong. Unquestionably he started out with the thought of stating a cause of action upon a statutory liability. He failed to take into consideration the defense of the statute of limitations. On making the discovery that he was out of court, he then attempts to rely upon certain explanatory allegations in his complaint which had a legitimate connection with the stating of a

cause of action upon a statutory liability, and now claims that these explanatory allegations really constituted the basis of his action, and is trying to stay in court by asking the Court to aid him by (App. Br. 4):

> "Permitting the *contract phase of this suit to be rounded out with the facts* and information sought to be supplied to the District Court in appellant's supplementary bill of complaint."

In taking this course, the appellant must first establish that his cause of action was stated on the ground that it was a contract made for the benefit of a third party. The Supreme Court of the State of Michigan, in *Simons v. Groesbeck, supra,* in its holding that the cause of action expressed in that contract lay exclusively with the receiver of the Detroit Bankers Company, destroys any possibility of the appellant successfully making any claim that the cause of action as stated is based upon the third party theory. His attempt to cure the weakness of his cause of action by securing the assignment of the right of action vested in the Detroit Bankers Company receiver will not aid him, for reasons hereinafter explained.

Appellant (App. Br. p. 44) refers to appellee's claim that Article IX-A is void on the ground that the same interferes with, overrides, and curtails an Act of Congress. This question receives consideration hereinafter in Point II, page 40, *infra.*

Appellant makes the claim (App. Br. p. 48) that *Section 351 of the California Code of Civil Procedure* is such as to debar the appellee from the benefit of the California Statute of Limitations. This point receives consideration under Point VI, page 61, *infra.*

POINT II.

Article IX-A Cannot Form the Basis of an Action by Appellant to Collect Assessments Levied by the Comptroller of the Currency on Shareholders of a National Bank. Article IX-A Has, If Availed of by the Appellant, the Operative Effect of Over-Riding, Curtailing, and Making Negative an Act of Congress.

Article IX-A, as construed in *Simons v. Groesbeck, supra,* is held to be *for the benefit of all creditors and depositors of all banks and trust companies whose stock was held by the Detroit Bankers Company.* It was also held by that Court that it was the duty of the receiver of the Detroit Bankers Company to collect from its shareholders any assessment levied upon the Detroit Bankers Company by any of the corporate units' receivers, whose capital stock was held by the Detroit Bankers Company.

It will be noted that the attempt to collect the assessment is not confined only to the shareholders of First National Bank-Detroit who exchanged their shares. It is now spread over a field of shareholders in a manner that has the operative effect of reducing the statutory liability of the original First National Bank-Detroit shareholders by reason of the spread, to but a fractional part of their original liability and brings in an entirely different lot of debtors. The Act of Congress makes no provision for and does not vest either in the Comptroller of the Currency or his receiver any authority or power to minimize or waive the amount of the assessment as against the limited number of actual shareholders of the national bank and agree that that liability may be, without his consent, distributed among thousands of non-shareholders to the end that he must pursue a vast number of phantom shareholders in order to collect what he could collect under the statute directly from the original shareholders. Such a practice would be

intolerable and would result in the establishing of a precedent that would substantially invalidate the Act of Congress since it would put within the hands of the original shareholders the power to assign fractional interests of their liability to other persons and thus compel the national bank authorities to involve themselves in an extensive litigation in their endeavor to collect the liability, that not only would delay the liquidating of the assets for the benefit of the creditors, but would entail a vast number of lawsuits, and a cost out of all proportion to the benefits. The creditors and depositors of the national bank would be absolutely unable to inform themselves as to the class of security they had. The very purpose of the act itself, and its super-added liability feature would be so minimized as to make it of questionable value.

It is stated in *Barbour v. Thomas, supra*, that there were approximately 9000 shareholders of Detroit Bankers Company as the result of the exchange of shares of various corporate organizations by their shareholders (to-wit, approximately 25) [R. 15], thereby redistributing their single liability among as many shareholders as there were in the original 25 units; merely to state the situation is to condemn it.

No Act of Congress can, under any circumstances, be interfered with, minimized, or destroyed by any state statute or state authority, or by the act of any combination of individuals. Any action by a state statute or its public officials that would tend to defeat, imperil, curtail, or make ineffective the purposes of the National Bank Act, as passed by Congress, will not be tolerated.

Davis v. Elmira Savings Bank (1896), 161 U. S. 275, 283, 284, 286, 288, 40 L. ed. 700;

First National Bank v. Colby (1875), 88 U. S. 21, 22 L. ed. 687;

First Natl. Bank of San Jose v. State of Calif. (1923), 262 U. S. 366, 369, 67 L. ed. 1030.

In the latter case the Court there said, pages 368, 369, concerning national banks, that they are

> "instrumentalities of the Federal Government. * * * any attempt by a state to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created." (Citing cases.)

The Court quotes from *Davis v. Elmira Savings Bank, supra,* in part, as follows:

> "They are means appropriate to that end. * * * By such means, brought into existence for this purpose and intended to be so employed, the states can exercise no control over them nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single state cannot give.'" (Citing authorities.)

The Court then quotes from *Easton v. Iowa* (1903), 188 U. S. 220, 229, 47 L. ed. 452, 456, and says, concerning the California statute there under consideration, page 370:

> "Obviously it attempts to qualify in an unusual way agreements between national banks and their customers, long understood when the former received deposits under their plainly granted powers. *If California may thus interfere other states may do likewise; and instead of twenty years, varying limitations may be prescribed, three years, perhaps, or 5, or 10, or 15. We cannot conclude that Congress intended to permit such results.* They seem incompatible to a purpose to establish a system of governmental agencies specifically empowered and expected freely to accept deposits from customers irrespective of domicile, with the commonly consequent duties and liabilities. * * * This Court has often pointed out

> the necessity for protecting federal agencies against interference by state legislation. The approved principle of *obsta principiis* should be adhered to." (Citing authorities.)

In the case of *Easton v. Iowa, supra,* there was involved the question as to the validity of certain legislation of the State of Iowa which forbade national banks, when insolvent, from accepting or receiving deposits, and providing that if any officer, knowing of such insolvency, accept deposits, he should be guilty of a felony.

The Supreme Court of Iowa had held the act valid and James H. Easton had been tried and found guilty and sentenced to imprisonment for violation of the state statute. The Supreme Court, after reviewing the contention of the state court to the effect that national banks were organized and operated for private gain, reaches the conclusion that they are necessary and proper for carrying into effect the powers vested in the government of the United States, and says, page 231:

> "It thus appears that Congress has provided a symmetrical and complete scheme for banks to be organized under the provisions of the statute."

The Court then refers to the contention of the attorney general of the State of Iowa that the Iowa *statute would operate beneficially in that it would require a higher degree of diligence* in the discharge of the banking officials' duties, that *it would give to the general public greater confidence,* and that *it would be an aid and an assistance to the government rather than an impediment* to the utility and efficiency of these agents and instrumentalities of the United States. The Court, concerning this argument, said, page 232:

> *"But we are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks*

by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities. Nor can we concede that by such legislation of a state as was attempted in this instance the affairs of a national bank, or the security of its creditors, would be advantageously affected."

The Court then discusses the state legislation from the standpoint of its dangers in respect to banks that may be temporarily embarrassed and the effect of the unyielding course of action prescribed by the state law, and then concludes:

> "However, it is not our province to vindicate the policy of the federal statute, *but to declare that it cannot be overridden by the policy of the state."*

The Court then, at page 237, cites *Prigg v. Penn* (1842), 16 Pet. 539, 10 L. ed. 1060, and quotes therefrom as follows:

> *"If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it."*

The Court then quotes from *Farmers & Merchants National Bank v. Dearing* (1875), 91 U. S. 29, 23 L. ed. 196.

In *Jennings v. U. S. Fidelity & Guaranty Co.* (1934), 294 U. S. 216, 226, 79 L. ed. 869, there was an attempt by state legislation to impress a trust upon funds collected by national banks, which legislation provided that upon the bank's suspension of business the funds so collected should fall into and become a part of a trust. The Court said, concerning the powers of the state to legislate upon questions legislated upon by Congress:

> *"The power of the nation within the field of its legitimate exercise overrides, in case of conflict, the power of the states."*

And in *Forrest v. Jack* (1935), 294 U. S. 158, 162, 79 L. ed. 829, 833, 96 A. L. R. 1457, it was said by the Court concerning the powers of the Comptroller of the Currency, that his

> "findings are conclusive. He acts under federal authority and in respect of determinations, orders and assessments, may not be trammeled, controlled or prevented by state laws."

In *Seabury v. Green* (1934), 294 U. S. 165, 169, 79 L. ed. 834, 96 A. L. R. 1463, the Court said, concerning certain sections of the National Bank Act:

> "As suggested in Forrest v. Jack, *supra, the enforcement of liability imposed by Section 66 may not be thwarted or impeded by state law."*

Government agencies cannot be subjected to state legislation.

> *Ableman v. Booth* (1859), 21 How. 506, 16 L. ed. 169.

Powers not conferred by Congress on national banks are denied.

> *Texas & Pacific Ry. Co. v. Pottorff* (1933), 291 U. S. 245, 253, 78 L. ed. 777, 782.

In the case of *Adams v. Nagle* (1937), 303 U. S. 532, 82 L. ed. 999, a stockholders' suit to enjoin the receiver of two national banks from enforcing assessments ordered by the Comptroller of the Currency, it appears that three national banks, for convenience here called the Penn, Reading National and Farmers National, two of which, the Penn and Reading, finding themselves embarrassed, entered into an agreement with the Farmers contemplating a consolidation, *and accordingly, under an agreement as between themselves, but without the consent of the Comptroller of the Currency, turned all of their assets over to the Farmers.* That company continued to do business with the commingled assets. Subsequently the Comptroller ruled that the agreements previously made tending toward consolidation were without legal effect and directed that the transfer and delivery of the assets and assumption of liabilities thereunder should be disregarded, and he attempted to allocate between the three banks the assets theretofore transferred. A plan of reorganization was set up but subsequently the Comptroller held that each of the three banks was insolvent and appointed a receiver for each of them, and levied upon the shareholders of the Penn and Reading banks an assessment of 100¢ on the dollar. The stockholders, in their bill filed against the receiver and the Comptroller, alleged unwarranted assumption of judicial power. The receiver interposed motions to dismiss. The District Court sustained the motion. The Circuit Court of Appeals reversed, holding that the bills of complaint set forth a good cause of action and that the Comptroller had exceeded his statutory power and acted arbitrarily in ordering the assessments. It was claimed that the Comptroller was at

liberty to treat all three banks as separate entities for the purpose of assessing stockholders' liability, and that the stockholders could not challenge his official findings as to insolvency and as to the necessity of an assessment. The Court held, page 538, that the attempted agreements of consolidation did not effect a consolidation in conformity with the National Bank Act so as to

> "constitute the existing stockholders of Penn and Reading, together with stockholders of Farmers, stockholders of a consolidated bank. The steps requisite to such consolidation were never taken.
>
> "When the Comptroller took charge of the banks in question *he was bound to deal with them, so far as their assets and liabilities were concerned, and in respect of stockholders' liability, upon the basis that they were three separate associations. This conclusion is unaffected by the legality and effectiveness of the agreement of February 17, 1933, upon which respondents insist. At most, the agreement substituted a new asset—the promise of Farmers—for the old assets.* Respondents do not claim that the contract and the transfer pursuant to it worked a novation *whereby the creditors of the transferring banks became creditors of the transferee.* So far as the Comptroller was concerned these creditors were still those of the former and entitled to look to their assets for payment."

The Court, at page 540, discusses the powers of the Comptroller of the Currency and the binding effect of his decision upon a question of insolvency, and then says, page 544:

> "The collection of the assessment cannot be made to await the outcome of litigation of that question (whether the Comptroller's decision was erroneous as a matter of law). Moreover, if, as they assert, the Comptroller's judgment is wrong and the assets of Penn and Reading, consisting of their claims under the contract, are sufficient to pay their creditors, the

amounts paid pursuant to the assessments will be returned to stockholders in final liquidation. Meantime, however, the creditors *the protection of whose interest is the primary object of the statute, will have been paid and, as is right, reimbursement of the stockholders will await possible realization upon assets which the Comptroller believes insufficient to satisfy the creditors.*"

Applying the doctrine of this case to the case at bar, had the Comptroller and his receiver of First National Bank-Detroit pursued its shareholders who exchanged their national bank stock for the Detroit Bankers Company stock, to the end of where they were compelled to pay their assessment as levied by the Comptroller of the Currency, then they, as such stockholders would, had they felt that they had been injured by reason of the Comptroller's failure to pursue under Article IX-A, all of the shareholders of Detroit Bankers Company, have the right to call upon their associates as stockholders of the Detroit Bankers Company for a contribution based upon the agreement in Article IX-A. In other words, the contract expressed in Article IX-A can have no bearing upon the Comptroller of the Currency and his rights to collect assessments; nor can he avail himself of such alleged contractual rights as is expressed in Article IX-A. His duties are to collect the assets of the national bank, liquidate them, and pay its creditors and depositors. He is not doing so when he attempts to avail himself of contractual obligations between the national bank shareholders and a vast number of shareholders of a lot of other banks, whereby they, by mutual agreement, and to their own advantage, minimize their individual super-added liability to their own bank.

No such powers were conferred upon him by the Act of Congress and powers not conferred upon him are denied.

POINT III.

All the Shareholders of the First National Bank-Detroit, Notwithstanding Their Exchange of Their National Bank Shares for the Shares of the State Holding Corporation, Were Legally Bound by the Act of Congress to Pay Any Assessment Levied by the Comptroller of the Currency and the Subsequent Promise of Such Shareholders, as Evidenced by the Alleged Agreement Contained in Article IX-A to Pay Such Assessment Was But a Promise to Perform an Already Existing Legal Obligation and Is Without Consideration and Void.

The legal proposition here invoked is perhaps better stated in the opinion of the Court in *Cobb v. Cowdery* (1857), 40 Vt. 25, 95 Am. Dec. 370. The Court there said:

> "A promise by a party to do what he is bound in law to do is not an illegal consideration but is the same as no consideration at all, and is merely void."

The rule is also expressed in 6 *R. C. L.*, p. 664, Sec. 73, as follows:

> "Where a legal obligation exists, a cumulative promise to perform it, unless upon a new consideration, is a nullity. A promise cannot be conditioned upon a promise to do a thing to which a party is already legally bound."

To the same effect is the decision in *Skinner v. Garnett Gold Mining Company* (C. C., N. D. Cal. 1899), 96 Fed. 735, where the Court, quoting from *Sullivan v. Sullivan* (1893), 99 Cal. 187, 193, 33 Pac. 862, stated:

> "It is well settled that neither a promise to perform a duty nor the performance of a duty constitutes the consideration of a contract."

See also:

Alaska Packers Assn. v. Domenico (C. C. A. 9, 1902), 117 Fed. 99;

Cuneo Press, Inc. v. Claybourn Corp. (C. C. A. 7, 1937), 90 Fed. (2d) 233, 235;

Shannon v. Universal Mortgage & Discount Co. (1927), 116 Oh. St. 609, 157 N. E. 478, 54 A.L.R. 992, 998;

Tipton v. Tipton (1933), 133 Cal. App. 500, 506, 24 Pac. (2d) 525;

Erny v. Sauer (1912), 234 Pa. St. 330, 83 Atl. 205, Ann. Cas. 1913C 1241;

Keown & McEvoy v. Verlin (1925), 253 Mass. 374, 149 N. E. 115, 41 A. L. R. 1319;

Parmelee v. Thompson (1871), 45 N. Y. 58, 60.

Applying the foregoing doctrine to the case at bar, we find the allegations of the complaint state [R. 16]:

> "The Detroit Bankers Company as a corporation was a mere agent or trustee for the real and beneficial owners of the stock in the various units, including First National Bank-Detroit, whose capital stock stood in the name of Detroit Bankers Company; the stockholders in Detroit Bankers Company are the real, true and beneficial owners of the capital stock of the various units."

The bill of complaint makes the definite allegation that [R. 17]:

> *"the real, true and beneficial owners of the capital stock of First National Bank-Detroit, at the time of its insolvency, were the stockholders of said Detroit Bankers Company."*

It is also contended in the bill of complaint [R. 19] that C. O. Thomas as receiver of First National Bank-Detroit, and the plaintiff as his successor, notified all the share-

holders of the said bank, including Bertha H. Robertson, the defendant named herein:

> "of the fact that the Comptroller of the Currency did levy said assessment and made the same payable at the office of the receiver of said First National Bank-Detroit * * * *and likewise made demand upon said shareholders for payment of said assessment, including Bertha H. Robertson, the defendant herein, in accordance with the said orders of assessment of the Comptroller of the Currency and in accordance with said notice."*

We, therefore, have in the bill of complaint, the definite allegation that the appellee *was directly liable for the assessment levied by the Comptroller of the Currency to the appellant herein, that demand had accordingly been made upon her for the payment of the assessment,* and a further allegation contained in the complaint [R. 20] that:

> "Notwithstanding her liability and duty in the premises, to pay said assessment liability to the plaintiff herein, the defendant has paid only the sum of $2082.65 and has failed, refused, and neglected to pay the balance thereof."

In view of those allegations contained in the bill of complaint, which we must here accept as being true, the appellee herein was obligated by statute to pay the assessment as levied by the Comptroller of the Currency and she allegedly paid a part of it in accordance with the statutory obligation and demand. Any agreement, therefore, that she may have made as a shareholder in Detroit Bankers Company, again agreeing to pay this same obligation as levied by the Comptroller of the Currency, is but a secondary promise to perform a promise and is void and a nullity. It is not and cannot be an actionable promise of which the appellant can avail himself—it was totally without consideration.

POINT IV.

The Action as It Now Stands, If It Be Based Upon an Express Written Contract (Which Is Denied) Must Be on the Theory That Such Alleged Contract Was Made and Intended by the Contracting Parties for the Benefit of the Beneficiary and That Such Beneficiary Should Have an Enforceable Right Thereunder.

The Alleged Contract Was Not so Made or Intended and the Appellant Has No Enforceable Right Thereunder.

(a) Such a contract, for the reasons heretofore given, would be null and void and inoperative since it would be a substitution for a Congressional act, the will and authority of private individuals and state officials.

(b) It is not shown by any pleading filed here that such alleged contract was made or intended for the benefit of the appellant or that the appellant has any enforceable right thereunder. The right under Article IX-A is the exclusive asset of the Detroit Bankers Company.

The record [R. 11] shows that Article IX-A was incorporated in the Articles of Incorporation of the Detroit Bankers Company to meet the demands of state officials preliminary to the granting of Articles of Incorporation. It is alleged to have been made for the express purpose of assuring depositors and creditors of both national and state banks that the shareholders of Detroit Bankers Company were the true and beneficial owners of the national and state bank whose shares were held by Detroit Bankers Company.

In other words, what Article IX-A did was to give assurance to all the depositors and creditors of all the different 25 banking units whose capital stock had been exchanged by the shareholders for the capital stock of

Detroit Bankers Company that their relationship toward the parent companies continued as it had been before the exchange of the shares.

The Supreme Court of Michigan, in *Simons v. Groesbeck, supra,* held that this alleged contract was an asset of Detroit Bankers Company and was enforceable only by the receiver of the Detroit Bankers Company. There are some 25 separate units, the receiver of each of which would be entitled to sue each of the shareholders of Detroit Bankers Company, if it is held that the appellant herein is so entitled.

The holding of the Supreme Court of Michigan, in respect to the enforceability of the rights arising under Article IX-A, is that the creditors and depositors of the absorbed 25 banking *units are but incidental beneficiaries.* They have no actionable interest against Detroit Bankers Company shareholders. They are, if beneficiaries at all, *but incidental beneficiaries, as are also their respective receivers.*

Restatement, Contracts, Section 147;

Buckley v. Gray (1895), 110 Cal. 339, 42 Pac. 900, 31 L. R. A. 862;

O'Neil v. Ross (1929), 98 Cal. App. 306, 325, 326, 277 Pac. 123 (hearing denied by Supreme Court);

Langmaid, Contracts for Benefit of Third Persons, 27 Cal. Law Rev. 497, 505.

The only interest therein of the appellant lies in the hope that if and when the receiver of the Detroit Bankers Company has collected from its shareholders, under the alleged agreement expressed in Article IX-A, that it, the Detroit Bankers Company, will, in turn, pay to the separate receivers of the several banking units whose stock

he holds, and upon which assessments have been levied, their respective proportionate shares of such collections.

If each receiver of each of the separate 25 banking units could sue each of the 9000 or more shareholders of the Detroit Bankers Company for their pro rata share of the assessment levied against the Detroit Bankers Company, intolerable confusion would necessarily result and the Supreme Court of Michigan, in *Simons v. Groebeck, supra,* and the Circuit Court of Appeals in *Barbour v. Thomas, supra,* unquestionably recognized this situation when it was there held that the right of action lay in the receiver of the Detroit Bankers Company.

The Circuit Court of Appeals held that this self-imposed obligation by the shareholders of the Detroit Bankers Company was, in so far as it was concerned, merely an evidentiary fact. That such shareholders were the true and real owners of the First National Bank-Detroit shares. In other words, the Circuit Court of Appeals recognized the fact that whatever validity there might be as a contract obligation in Article IX-A, it was between the holding company's receiver and its shareholders and its only direct value to the national bank's receiver was of an evidentiary nature to establish the fact that the national bank's true and actual shareholders were the shareholders of the Detroit Bankers Company, and that such contract, as between the receiver of a national bank and its respective shareholders had an evidentiary value. Under such circumstances it would be impossible for the appellant to so frame a bill of complaint as to set up a good cause of action on this alleged contract, on the theory that it was made and intended for his benefit.

Wheat v. Rice (1884), 97 N. Y. 296, 301.

In short, none of the receivers for the different 25 banking units could show, as a matter of fact, that said alleged contract was in any respect made for his particular benefit or that of the creditors and depositors whom he

represented, nor would he have any better ground for an action as an assignee of the right of the assignor receiver of the Detroit Bankers Company, either acting under or without an order of the court allowing the assignment.

This alleged contract arising under Article IX-A was one and an entire contract to the effect that each of the shareholders would respond to the Detroit Bankers Company for his proportionate share of any statutory liability imposed on the Detroit Bankers Company by reason of its ownership of the shares of any bank or trust company. *This liability is entire and cannot be assigned in partial amounts by the Detroit Bankers Company, or its receiver to the various creditors of Detroit Bankers Company, without the consent of the obligor.* It is not alleged or shown here that any such consent was requested or given before the assignment of date of October 6, 1938 [R. 39-43], nor would such an assignment be enforceable in equity, since all the parties in interest are not before the Court, to the end that the rights of each may be settled in one suit by one decree.

2 R. C. L., pp. 618-625, incl., Secs. 26-33, incl.

(c) The bill of complaint states no cause of action upon a contract made as between a promisor and a promisee and intended for the benefit of a third party.

It is elementary that one suing upon a contract as having been made for his benefit must show that he was intended, by the contracting parties, as beneficiary and that it was intended that he thereby have an enforceable right.

Smith v. Anglo Calif. Trust Co., (1928), 205 Cal. 496, 502, 271 Pac. 898;

Federal Surety Co. v. Mpls. Steel & Machinery Co. (C. C. A. 8, 1927), 17 Fed. (2d) 242;

Second Natl. Bank v. Grand Lodge of A. F. & A. M. (1878), 98 U. S. 123, 124, 25 L. ed. 75;

Constable v. Natl. Steamship Co. (1893), 154 U. S. 51, 38 L. ed. 903;

Durnherr v. Rau (1892), 135 N. Y. 219, 32 N. E. 49.

In this latter case it is held:

> "It is not sufficient that the performance of the covenant may benefit a third person. It must have been entered into for his benefit or at least such benefit must be the direct result of performance and so within the contemplation of the parties."

In this case the Court specifically limited *Lawrence v. Fox* (1859), 20 N. Y. 268, to its original limits.

Green County v. Southern Surety Co. (1928), 292 Pa. 304, 310, 315, 316, 141 A. 27.

And in 13 *C. J.* 709, Sec. 817, it is stated:

> "By the weight of authority, the action cannot be maintained *merely because the third person will be incidentally benefited by performance of the contract;* he must be a party to the consideration, or the contract must have been entered into for his benefit and he must have some legal or equitable interest in its performance."

The fact that the record here shows that the appellant is now attempting to sustain his alleged right by presenting and filing a supplemental bill setting up the assignment of this alleged contract, *is conclusive evidence of the fact that no contract was ever made for his benefit as a third party beneficiary, upon which a cause of action could be grounded,* and the holding in *Simons v. Groesbeck, supra,* is equivalent to a denial by the promisee of the validity of such alleged third party rights. The contract *as it was made, according to that decision, was for the benefit of the receiver of the Detroit Bankers Company* it was its asset, the right under the contract lies exclusively with the promisee, and as held in that case, enforceable by its receiver only.

(d) Article IX-A is but a repetition of the statutory liability and is not assignable.

Shareholders' super-added statutory liabilities are imposed for the benefit of the corporation's creditors and is not an assignable chose in action.

Hood, Commissioner of Banks v. Richardson Realty Co. (1937), 211 N. Car. 582, 191 S. E. 410, 414;

Jacobson v. Allen (C. C. N. Y.), 12 Fed. 454;

7 R. C. L. 389;

Andrew v. State Bank (1913), 214 Iowa 1339, 242 N. W. 62, 82 A. L. R. 1280.

(e) For reasons heretofore given, the receiver of a national bank can neither maintain an action upon a nebulous contractual right as a third party thereto nor upon an assignment of such an alleged right from the promisee to the exclusion and in preference to his pursuing of the right vested in him by Congressional act (Secs. 191 and 192, 12 U. S. C. A.).

Congressional legislation is exclusive in the field it covers.

Davis v. Elmira Savings Bank (1896), 161 U. S. 275, 283, 40 L. ed. 700, 701.

It was said in *Schram v. Plym* (1934, D. C. Mich.), 7 Fed. Supp. 478, the Court there addressing its remarks to the involved stock transactions growing out of these Michigan bank failures:

"Creditors of banks and their representatives are not to be burdened with the duty of unravelling the tangled skein resulting from efforts to *evade the clear purpose of statutes imposing a double liability upon stockholders in the event of failure.*"

POINT V.

Appellant Has Lost His Right to Any Relief by Reason of His Laches.

The assessment levied herein was due and payable July 31, 1933 [R. 18]. Appellee was a resident and citizen of Detroit, Michigan, from the time the assessment fell due, July 31, 1933, to January 1, 1938 [R. 4, App. Br. 48]. From January 1, 1938 to July 7, 1938, she was a resident of Los Angeles County [R. 4]. No excuse is offered by appellant for this delay of 4½ years in failing to bring this action during all of which time appellant knew appellee was refusing to pay and that she could have been easily reached by court process.

Due to this long delay in instituting this action, appellee was lulled into the belief that no action would be brought, that while living in Detroit documents, records, and witnesses were readily accessible to appellee whereby she could have presented her defense at reasonable expense, but if she must try this action at a distance of nearly 3000 miles from all the necessary records, her individual files, and the bank files, the expense will be very great, and she will be greatly inconvenienced and put to a disadvantage. Certainly appellant has not been vigilant. Appellant did not seek to enforce his rights until the condition of the affairs of the appellee had so changed as to make it almost prohibitive for her to present her defense fully. It is claimed in the bill of complaint that an

accounting is necessary [R. 20], that the "suit involves complicated matters and interests, and degrees of interest, and the transfer of the capital stock of a national banking association to an agent of the stockholder, resulting in a fraud upon the creditors of the said association," [R. 21]. The proof of such allegations and preparing and defending same calls for the examination of many personal and bank records, the testimony of witnesses informed of such matters, if their testimony is to be had at all, assuming that they have not died in the 4½ years, and they can only be had by means of depositions and at great expense. The allegation that appellee paid $2,082.65 [R. 20], while seemingly an admission of liability on the part of appellee, if she be given the opportunity to prove the facts and have access to the proper records, can be easily explained and an entirely different complexion given the allegation. So also the allegation that appellee is a shareholder in First National Bank-Detroit, is an allegation that can only be met by production of the actual bank records of the bank of which she was a shareholder. There is not and cannot be any claim that appellee fled from threatened litigation or at any time attempted to evade it. By her long residence in Detroit after the cause of action matured, she gave appellant every opportunity to sue her and it is not claimed otherwise, but as soon as appellee was, by reason of her change of residence, put to a disadvantage in preparing and defending the action, the action was filed very quickly. Appellee,

situated as she now is, will be done a great injustice and a fair determination of the controversy cannot now be had, both by reason of the lapse of time, possible deaths, and the great distance from very material records, data, and necessary witnesses.

While appellee has not raised the question of laches by any specific pleading, we believe that the motion to dismiss and for judgment [R. 34] is sufficiently broad to cover the relief.

In any event, the record discloses a status of affairs that warrants this Court, of its own motion, raising the question; the Court may be passive and refuse relief.

Sullivan etc. v. Portland etc. R. Co. (1877), 94 U. S. 806, 24 L. ed. 324;

Johnson v. Florida Transit etc. R. Co. (C. C. Fla., 1883), 18 Fed. 821;

Leavenworth Co. v. Chicago etc. R. Co. (C. C. Mo., 1883), 18 Fed. 209.

POINT VI.

The Action Herein Being Upon "a Liability Created by Law," Is Barred Both as to the Remedy and the Right, Under Section 359, California Code of Civil Procedure.

(a) *Section 359, California Code of Civil Procedure,* is a conclusive defense to the action.

The bill of complaint [R. 19] shows that the cause of action arose not later than July 31, 1933, the final due date of the assessment. The complaint was filed herein July 7, 1938. More than three years elapsed between the date the cause of action matured and the filing of the complaint.

The case is conclusively disposed of by the decision of this Court in *Johnson v. Green* (C. C. A. 9, 1937), 88 Fed. (2d) 638.

(b) *Section 351, California Code of Civil Procedure,* has no bearing on this case.

That section of the California code is what is known as the absence from the state exception.

It is true that appellee did not become a resident until about January 1, 1938, and that three years have not elapsed since she became a resident, but it will be noticed that *Section 359,* upon which appellee relies, specifically provides that "this title" *("Title II," "Time of commencing civil actions," California Code of Civil Procedure)* "does not affect actions against directors or stockholders of a corporation * * * to enforce a liability created by law."

In *King v. Armstrong* (1908), 9 Cal. App. 368, 371, 99 Pac. 527, the Court there said, concerning the effect of *Section 351* upon the right to plead the statute of limitations as provided in *Section 359, Code of Civil Procedure,* that:

> "Said section 351, the provisions of which appellant invokes, *is a part of the title which, by section 359, in express terms, is declared inapplicable to actions to enforce the liability created by law,* to which class this action belongs. It is true, as argued by appellant, that the provisions of section 351 extending the time during the period of absence is broad, and without qualification, that its provisions are general may be admitted, but where there are, in an act, specific provisions relating to a particular subject, they must govern in respect to that subject as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate. (Citing cases.) In other sections of the Title II the Legislature declares a general rule as to the time within which actions shall be brought, and provide that such prescribed times shall not run during the absence from the state of the party against whom such action has accrued, and then deliberately and in positive terms provide that such rule shall not apply to an action against a stockholder to enforce a liability created by law. As said in Hunt v. Ward, 99 Cal. 614: 'There is no room for the plea of interpretation when the language under review leaves no doubt as to the meaning of those who use it.'"

This authority was, in this respect, approved by the Supreme Court of the State of California in *In re East Bay Municipal Utility Water Bonds of 1925,* 196 Cal. 725, 731, 239 Pac. 38.

See, also, 16 *Cal. Jur.* 553.

The State of Montana copied *Sections 351 and 359 of the California Code of Civil Procedure* and same became corresponding *Sections 541 and 554 of the Montana Code.* In *Richards v. Carpenter* (C. C. A. 6, 1919), 261 Fed. 724, 728, the Court, after reviewing the case of *Davis v. Mills* (1904), 194 U. S. 451, 48 L. ed. 1067, to which we hereafter refer, said concerning that case and its review of the Montana statute:

> "Incidentally this case also disposes of the contention that that section" (Sec. 541, Montana statute) "providing that the time of absence from the state shall not be counted as operative to extend a three year period of Section 354 (Montana statutes)."

The Court in the *Richards* case points out that Section 541 of the Montana Code is one of those in the title in which the section creating the three-year statute of limitations is found and that this Section 554 of the Montana statute expressly declares:

> "This title does not affect the specific action involved."

And further says:

> "The section plainly means that neither the general periods named nor the exceptions to and modification

> of those general periods have anything to do with the named action. Precisely the same situation exists under the New York Code."

The Court, in the *Richards* case (which case concerned the New York limitation statute and which was copied by the California legislature), was construing *Section 394, New York Code of Civil Procedure,* and said, page 726:

> "This section is a part of Title II, Chapter 4 of the New York Code. The chapter is entitled 'limitation of the time of enforcing a civil remedy.' * * * The decisive question is whether this three year limitation *should be considered as an ordinary statute of limitation, or as a condition affixed to the liability.* If the former, the action would not be barred in New York because the defendants have not been within the state. * * * And it would not be barred in Tennessee because the general applicable statute of Tennessee provides for six years. * * * What we have said to be the decisive question is controlled by the decision of the Supreme Court in Davis v. Mills, 194 U. S. 451, 48 L. ed. 1067. There is, in our opinion, no substantial distinction between the facts of that case and of this."

The Court, after further discussing *Davis v. Mills, supra,* and the statute involved in that case as compared with the statute involved in this, says, page 727:

> "Thus we have a liability independently created by a manufacturing corporation law, just as there is in the *present case an independent liability created by the banking law. Neither in that case nor in this did the statute which created the liability prescribe any time limitation."*

The Court then reviews *Davis v. Mills, supra,* and at page 729, reviews *Platt v. Wilmot* (1904), 193 U. S. 154, 158, 48 L. ed. 809, and its construction of *Section 394, New York Code of Civil Procedure, and holds that the stockholders' liability was extinguished in both New York and Tennessee* by reason of *Section 394, New York Code of Civil Procedure.*

In *Davis v. Mills, supra,* the Court was construing *Section 554 of the Code of Civil Procedure of the State of Montana.*

We here ask the Court to review in the Appendix [p. 12], this case also *Williams, Rec. v. Higler, et al.* (1926), 77 Mont. 399, 251 P. 524 [see Appendix p. 16], and *Furst v. Beggeh* (1934), 192 Minn. 454, 257 N. W. 79, 80, all of which cases are directly in point. The following other cases bear on the same statutes and points:

Northern Pac. Ry. Co. v. Crowell (D. C. N. J., 1917), 245 Fed. 668, 673;

Brown v. Roberts (1927), 78 Mont. 301, 305, 307, 254 P. 419.

The California *Section 359 of the Code of Civil Procedure,* was taken from the New York Code.

Rogers v. Hatch (1872), 44 Cal. 280, 282;

Damiano v. Bunting (1919), 40 Cal. App. 566, 181 Pac. 232.

Sections 359 and 351, California Code of Civil Procedure, are set forth in full in the Appendix, p. 18.

The New York Statute was construed in *Hobbs v. National Bank of Commerce* (C. C. A. 2, 1899), 96 Fed.

396, certiorari denied, 178 U. S. 613, 44 L. ed. 1216, rehearing denied, 101 Fed. 75.

See also *Platt v. Wilmot* (1904), 193 U. S. 154, 158, 48 L. ed. 809; *Seattle National Bank v. Pratt* (C. C. A. 2, 1901), 111 Fed. 841, affirming 103 Fed. 62; and *Hilke v. Hale* (C. C. A. 2, 1902), 107 Fed. 220.

It may be said in conclusion that *Sections 359, California Code of Civil Procedure, Section 554 of the Montana Code of Civil Procedure,* and *Section 394 of the New York Code of Civil Procedure,* all being alike, and each having received a like construction, that there is no longer an open question as to whether *Section 351 of the California Code of Civil Procedure* has any bearing where Section 359 is plead in bar.

(c) *Section 359, California Code of Civil Procedure,* runs both to the remedy and to the right and where one is extinguished the other is extinguished.

There is no question but that statutes that both prescribe the right and a limitation period, that upon the expiration of the limitation period the liability itself ceases to exist.

Kansas City Southern Ry. Co. v. Wolf (1923), 261 U. S. 133, 67 L. ed. 571;

Phillips Co. v. Grand Trunk Ry. Co. (1915), 236 U. S. 662, 667, 668, 59 L. ed. 774;

Denver & Rio Grand R. Co. v. U. S. (C. C. A. 8, 1917), 241 Fed. 614;

Pittsburg Co. & St. L. Ry. v. Hine (1874), 25 Oh. St. 629.

While *Section 359, California Code of Civil Procedure,* does not constitute an integral part of the California statute concerning stockholders' liability for corporate debts (no longer in existence) yet the statute was enacted with specific reference to the enforcement of the liability created by law against directors and stockholders of corporations and none other, and specifically provides that such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the liability was created. Similar statutes were interpreted as extinguishing the right in:

Davis v. Mills, supra [see Appendix, p. 12];

Platt v. Wilmot, supra;

Richards v. Carpenter, supra;

Steamer Harrisburg v. Rickards (1886), 119 U. S. 199, 30 L. ed. 358, 362.

In *Moran v. Harrison* (C. C. A., D. C. 1937), 91 Fed. (2d) 310, 113 A. L. R. 505, 508, Cer. Den. 302 U. S. 740, 82 L. ed. 572, it was held that it does not matter in respect to the destruction of this right, that the statute which creates the limitation is of a later date than the statute which creates the right if the limitation statute is clearly and obviously directed to the previous statute. The Court said:

> *"In such case it is just as certainly a limitation upon the right and just as much a part of the right itself as where the right and the limitation are embraced in a single statute."*

It was further held by the Court in this case:

> "When *the three years passed, not the limitation alone, but the right itself was gone.* * * * This is the rule supported by reason, and as the Supreme Court said in Fourth National Bank v. Francklyn, *supra* (120 U. S. 747, 30 L. ed. 825): 'To hold otherwise would be to subject the stockholders out of the state to a greater burden than those within the state.'"

The notes appended to this case in 113 A. L. R. are especially enlightening.

We here beg to call the attention of the Court, respecting this question of the termination of both *right* and remedy, to Mr. Justice Holmes' opinion in *Davis v. Mills, supra.* There he was construing the Montana statute which is an exact copy of *Section 359, California Code of Civil Procedure.* The quotation is too lengthy to incorporate here and appears in the Appendix, p. 12. There then follows in the Appendix, the Supreme Court of Montana's interpretation of *Davis v. Mills, supra,* as pertaining to its Code sections in question. See *Williams, Receiver v. Hilger, et al., supra,* Appendix, p. 16, also the interpretation of the same statute in *Furst v. Beggeh, supra,* Appendix, p. 17.

To the same effect is *Royal Trust Co. v. MacBean, et al.* (1914), 168 Cal. 642, 646, 648, 144 Pac. 139.

The fact that the shareholders' liability arises under the statute of another state or of the Federal government, does not prevent *Section 359, California Code of Civil Procedure,* from being applied to the same extent and just as fully as it would be applied if the shares were

those of a corporation chartered under the California statutes.

It is the policy of the laws of California to terminate both the remedy and the right in three years' time after the creation of a liability created by law. That policy is applied to shareholders in California corporations and it would be against the policy of California laws to extend to creditors of a foreign corporation a greater privilege than that extended to creditors of its own corporations.

Contracts valid where made may be destroyed or invalidated by the forum courts pursuant to its statutes or otherwise.

> *Home Ins. Co. v. Dick* (1930), 281 U. S. 408, 410, 74 L. ed. 926, 934.

The Court also held:

> "A state may prohibit the enjoyment by persons within its borders of rights acquired elsewhere which violate its laws or public policy, and under some circumstances it may refuse to aid in the enforcement of such rights."

In *Bothwell v. Buckbee, Mears Co.* (1927), 275 U. S. 274, 72 L. ed. 277, the Court, at page 278, says:

> "Under rules of law generally applicable, a state may refuse to enforce a contract which provides for doing within it an act prohibited by its law."

It has been held in numerous cases that the policy of the laws of the forum will be enforced even to invalidating contracts made and valid in a foreign state by a resident of the forum when such contracts are sought to be enforced in the state of the promisor.

Union Trust Co. v. Grosman (1917), 245 U. S. 412, 416, 417, 62 L. ed. 368.

The opinion of the Circuit Court of Appeals in this case is especially enlightening, *Grosman v. Union Trust Co.* (C. C. A. 5, 1916), 228 Fed. 610, Ann. Cas. 1917 B, 613.

In *Emery v. Burbank* (1895), 163 Mass. 326, 39 N. E. 1026, 28 L. R. A. 57, Justice Holmes, afterwards Mr. Justice Holmes, said, concerning a Maine contract:

> "A contract valid where it is made is valid everywhere; *but it is not necessarily enforceable everywhere. It may be contrary to the policy of the law of the forum. * * * If the policy of Massachusetts makes void an oral contract of this sort, made within the state, the same policy forbids that Massachusetts testators should be sued here upon such contracts without written evidence wherever it is made.*"

See also *Hudson v. Von Hamm* (1927), 85 Cal. App. 323, 328, 259 Pac. 374.

We respectfully maintain that California, by *Section 359, Code of Civil Procedure*, evidences a policy of law respecting corporate shareholders' statutory super-added liability that nullifies both the remedy and the right if the action be not instituted within the three year period. *"It is a condition attached to the right to sue at all."*

> *Steamer Harrisburg v. Rickards* (1886), 119 U. S. 199, 30 L. ed. 358, 362.

Since the alleged contractual right here is necessarily dependent on there being an assessment levied by the Comptroller, and since the remedy and the liability under the assessment have ceased to exist by reason of the limitation statute of the forum, then the alleged contractual right under Article IX-A is without foundation for its existence; it is likewise gone.

(d) The enforceability of the alleged contractual liability under Article IX-A being entirely dependent upon the pre-existing matured obligation arising by the levy of the assessment by the Comptroller of the Currency, when the remedy available for the collection of that assessment and the right to collect at all terminated, there terminated also any alleged right under Article IX-A.

POINT VII.

The District Court Did Not Err in Denying Appellant Leave to File the Supplemental Bill of Complaint. The Question Is Not Reviewable Here.

(a) The refusal of the District Court to allow the filing of the supplemental bill was a matter of discretion and is not reviewable here.

In *Dean v. Mason* (1857), 20 How. 198, 15 L. Ed. 876, 878, the Court said:

> "The refusal of the Circuit Court to permit the supplemental bill to be filed by Baker and Smith was, under the circumstances, a matter of discretion in the court; and it affords no ground for the reversal of the decree."

In *Chapman v. Barney* (1899), 129 U. S. 677, 32 L. Ed. 800, the Court said:

> "Amendments are discretionary with the court below and not reviewable by this court." (Citing many cases.)

To the same effect are:

> *Mayor & Alderman of City of Vicksburg v. Vicksburg Water Works,* 202 U. S. 453, 462, 50 L. Ed. 1102, 1108.

The appellate court only reviews the action of the trial court in denying leave to amend, when it appears that the discretion as exercised was abused.

> 1 *Bancroft Code Pleading,* p. 743 (citing numerous California cases and other cases).

The action of the trial court was in no sense arbitrary or capricious.

(b) The supplemental bill sought to be filed herein sets up a new cause of action.

Appellant contends (App. Br. pp. 56-63, incl.) that the setting up by supplemental bill of the assignment [R. 39] is "not essential to vest in appellant the right to proceed against appellee and to collect, * * * her ratable and proportionate part of this assessment upon her contract obligation." (App. Br. 56.)

We fail to see any justification for the filing of the supplemental bill in view of such statement. As the records stands, appellant's theory is that he has a good cause of action grounded upon a contract made for the benefit of a third party. That in itself is one entire cause of action and the defense to such form of action is entirely different from the defense that would be made as to an action upon an express written contract. In

truth, appellant is seeking to incorporate an alleged third cause of action. He has undoubtedly stated a cause of action upon a statutory liability. He claims to have stated a cause of action as a third party beneficiary under a contract, and now would inject a third alleged cause of action grounded on a written contract.

There is no reason why this pleader should not be confined to the same rules of pleading as would be any other plaintiff.

To now claim that what he wants to inject into the record is matter that has occurred since the filing of the original bill (App. Br. 58), conceding that it is new matter, which we deny, if it is "an additional right or interest," he is not entitled to file it, since it is a new cause of action, and if it is not "an additional right or interest," he, on his theory of the cause of action, has no need of it. (App. Br. 58, 59.)

As for the additional right given to appellant by virtue of this alleged assignment, being new matter, this cannot be true since appellant has known ever since the Circuit Court of Appeals decision in *Barbour v. Thomas, supra,* in 1936, and the decision in *Simons v. Groesbeck, supra,* in 1934, that the right to sue on the alleged contract arising out of Article IX-A was vested exclusively in the receiver of the Detroit Bankers Company. There is nothing new about the matter now sought to be pleaded. *To*

permit the filing of this supplemental bill would operate to deprive this appellee of the defense of a statute of limitation that would otherwise be a complete bar. The effect of allowing the amendment will be to defeat the operation of a statute and courts will not permit such.

See editorial notes (to *Missouri K. & T. Co. v. Bagley* (1902), 65 Kans. 188), appearing in 3 L. R. A. (N. S.) 259, 266, 267, 270, 271, 292. The Supreme Court of Michigan said concerning such procedure, in *People ex rel. Gorman v. Judge of Newaygo Circuit Court* (1873), 27 Mich. 138:

> "It is clear enough that the only purpose and object of allowing the *amended declaration were to prevent the statute bar of the action. We do not think the statute can be evaded by any such necromancy;* and to permit the shallow fiction of a relation back to the commencement of the suit, under such circumstances, to nullify an act of the legislature, would be discreditable to the judiciary."

Situations of the character of those here impending have frequently come before the courts. Complainants have frequently sought to save a lost cause or get away from the effect of a particular statute by setting up addi-

tional or new matter by way of amendment or supplemental bill, and such claims have been universally denied.

Atchison, T. & S. F. R. Co. v. Schroeder (1896), 56 Kan. 731, 44 Pac. 1043;

Union Pac. R. Co. v. Wyler (1895), 157 U. S. 285, 295, 39 L. ed. 985;

Mohr v. Lemle (1881), 69 Ala. 180, ...;

You cannot, under the guise of an amendment, save a lost cause.

Peiser v. Griffin (1899), 125 Cal. 9, 12, 13, 14, 57 Pac. 690.

Nor can an issue be created by amendment where as yet none has been presented.

Nelson v. Barker, Fed. Cas. No. 10101;

Ill. Central Ry. Co. v. Campbell ( ), 170 Ill. 163, 49 N. E. 314;

Missouri, K. & T. Co. v. Bagley, supra.

If the Court here rule that leave to file the supplemental bill should be granted, appellee should likewise be granted an opportunity to plead thereto.

POINT VIII.

The Cause of Action as Stated Is Not Equitable, the Appellant Has a Complete Remedy at Law and, While Under the New Rules No Such Distinction Now Exists, Yet the Appellee Should Not, Under the Guise of an Equitable Action, Be Deprived of the Right to a Jury Trial or the Right to Present Such Substantive Principles of Law as Obtain in Actions at Law.

The action here is to recover a 100% assessment (App. Br. 7). Where the Comptroller seeks to recover by assessment the whole amount that may be assessed, the action must be one at law.

> *Kennedy, Rec. v. Gibson, et al.* (1869), 8 Wall. 498, 19 L. ed. 476;
>
> *Aufdenkampf v. L'Herrison* (C. C. A. 9, 1932), 56 Fed. (2d) 344.

Appellee cannot be compelled to try, as an equitable cause of action, a suit which seeks a legal remedy.

> *Twist v. Prairie Oil Co.* (1927), 274 U. S. 684, 690, 71 L. ed. 1297.

The Court will interpose the objection of its own motion *sua sponte.*

> *Singer Sewing Machine Co. v. Benedict* (1913), 229 U. S. 481, 484, 57 L. ed. 1288.

One cannot link with a cause of action triable at law, some pretended equitable claim and thus defeat a trial by jury.

> *Scott v. Neely* (1891), 140 U. S. 106, 35 L. ed. 358.

The appellee has a constitutional right to a trial by jury.

Hipp v. Babin (1857), 19 How. 271, 15 L. ed. 633.

The bill of complaint, if grounded on contract, as claimed, pleads sufficient facts, if proven by oral and documentary evidence, to give him all the relief he is entitled to in an action at law. If there be any such cause of action it is quite inconceivable why it cannot and should not be maintained as a simple action at law. No accounting is necessary other than a single mathematical calculation.

CONCLUSION.

We respectfully submit that the action here is upon a liability created by law. That the appellant should not now be permitted to destroy this appellee's conclusive defense to the existing action by his now introducing an entirely new and different cause of action.

Prior to October 6, 1938, the date of the assignment [R. 43] appellant had no grounds upon which he could state any cause of action other than one based on a statutory liability. His conduct in securing and accepting the assignment is both an admission of no previous contractual rights and an estoppel to claim under any alleged prior contractual rights.

Without repeating the arguments heretofore made, we respectfully maintain that each and every of our other several points set forth in the foregoing argument are conclusive of appellee's contentions.

It will be noted that the appellant charges in his bill of complaint [R. 9-11, Incl.] that while the Detroit Bankers Company had been organized for certain designated lawful purposes set out in the bill [R. 18], yet the

> "true and actual purpose for which said Detroit Bankers Company was created was *in furtherance of a scheme to enable its stockholders,* through agents appointed by them, to acquire, own, hold, control and operate a group of state and national banks."

The bill of complaint then follows with a *lengthy list of alleged unlawful* acts and states [R. 11]:

> *"All contrary to and in defiance of the meaning, spirit and intent of the laws of the United States* and the State of Michigan relating to the operation and supervision of banks and trust companies."

The bill of complaint then proceeds to state [R. 11]:

> "In order to satisfy state and federal authorities and in order to obtain and hold public confidence," etc.,

the stockholders of the Detroit Bankers Company incorporated in its Articles of Association Article IX-A.

It is further charged [R. 14] that:

> *"By virtue of these unlawful activities the* Detroit Bankers Company acquired the substantial control and/or ownership of"

some 25 other state and national banks.

Article IX-A is the direct fruit of this alleged unlawful scheme conceived by these stockholders, whereby they were enabled to violate the "meaning, spirit and intent of the laws of the United States." Article IX-A had to be put in the Articles of Association to satisfy federal and state authorities in order that Detroit Bankers Company could be brought into existence, after it was brought into existence, it secured the control of these numerous banks, and thereby engaged in the unlawful activities alleged.

We respectfully maintain that for the Comptroller of the Currency to attempt to secure the benefit of Article IX-A has the operative effect, and results in his availing himself of, and his countenancing the unlawful acts referred to in the bill of complaint. Whereas, if he pursued his statutory right it would be less expensive and more expeditious and not involve him in countenancing the unlawful practices adopted by the Detroit Bankers Company. Furthermore, this Court, sitting as a court of equity, should not be ready or willing to grant relief under an alleged contract that has its foundation in a scheme whereby the Detroit Bankers Company was permitted to engage in unlawful practices.

The judgment should be affirmed and appellee recover her costs herein.

Dated at Los Angeles, California, October 11th, 1939.

Respectfully submitted,

E. C. Pyle,

L. B. Robertson,

Attorneys for Appellee, Bertha H. Robertson.

APPENDIX.

Exerpts from bill of complaint supporting appellee's claim that the cause of action is grounded on a statutory liability:

Record, page 4, paragraph 3:

"This is a suit of a civil nature, brought by the plaintiff as receiver of First National Bank-Detroit, * * * and this suit is brought in performance of his official duties in winding up the affairs of a national banking association, and for the enforcement of the liability imposed by the laws of the United States."

Record, page 5, recites the incorporation of Detroit Bankers Company, the conception, prior to its incorpation, of certain bankers through a committee, to pool their stockholdings in said banks, "So as to bring about a merger, consolidation or unification of said banks and the stockholdings therein."

Record, page 6, paragraph 10, recites that the stockholders, to the extent of 97% of the shareholders of the several banks, pursuant to this plan, and in order to accomplish their purpose, authorized an authorized agent to sign an agreement effectuating the plan; that under said agreement and plan a committe was appointed as agent and attorney for each individual stockholder and empowered to organize a holding corporation, namely, "Detroit Bankers Company, capitalized as aforesaid, all in accordance with the provisions of said written agreement, executed by or on behalf of the stockholders."

Record, page 6, paragraph 12:

"Said committee of twelve, representing the said stockholders, were the sole incorporators of said holding company thereafter incorporated as Detroit Bankers Company in January, 1930, and the members of the said committee were the sole subscribers to all of the non-par value stock of said company, known as 'trustee stock', and were the sole original trustees under a trust agreement executed to secure the election of said committee of twelve as the sole directors of said holding company, known as Detroit Bankers Company, for the ensuing five years."

Record, page 7:

Alleges that the committee were duly elected and qualified as such directors of the holding company, that under the plan no one could vote for a director except a trustee, and no one could be elected unless he was a trustee, that common stockholders had no right to vote in the election of officers, or in the management of the corporation's affairs for five years.

Record, page 7, paragraph 15:

"Under said plan, whereby the holding company came into being, stock was exchanged for the holding company certificates on the basis of anticipated dividends from each of the five banks in such proportion as would insure payment of 17% per annum on the par value of the common stock of Detroit Bankers Company, and under the plan, substantially all dividends received from the above-mentioned five banks were disbursed as dividends to the stockholders of Detroit Bankers Company, it being provided in said plan that the overhead and operating expenses of Detroit Bankers Company would be met

by assessment levied by it upon said five banks under a so-called 'service contract' to be entered into with said banks."

Record, page 8, paragraph 17:

"By said plan and arrangement, it was contemplated that the holding company should, and it did, become the holder of practically all of the stock of said five banks, by exchanging the stock of said Detroit Bankers Company stock for stock in said banks."

Record, page 8, paragraph 18:

"Said Detroit Bankers Company had no assets except the bank stocks, which were exchanged for stock of Detroit Bankers Company, and no money was ever contributed by shareholders of Detroit Bankers Company to its capital; the one hundred twenty (120) shares of 'trustee stock' were paid for by the aforementioned five banks, and the money required for the payment of the fees to the State of Michigan for filing its articles of association, and for qualifying its shares, was contributed by said banks."

Record, page 8, paragraph 19:

That all directors' qualifying shares in the several banks was the property of the Detroit Bankers Company, being issued in the name of directors of the several banks as so-called directors' qualifying shares.

Record, page 8, paragraph 20:

That the directors signed contracts assigning the dividends from the qualifying shares to the Detroit Bankers Company, and also assigned the stock back to that com-

pany and in many instances they never had possession of the shares of stock, but that they appeared of record on the books of the several banks as the owners.

"They actually had no power over the same ,and did not enjoy or exercise any of the rights and privileges pertaining to said stock."

Record, page 9, paragraph 21:

This is devoted to an explanation of the manner in which the Detroit Bankers Company dictated to the unit banks the amount of the dividends which they should pay, the loans that could be made from one unit to another, shifted the assets of the banks, nominated and elected the directors, and otherwise dominated and controlled them.

Record, page 9, paragraph 23:

"Although said Detroit Bankers Company was organized for the alleged purpose, as set forth in Article III of its Articles of Association, reading as follows: (then follows a quotation of Article III as to the general powers of the Detroit Bankers Company to own stocks and deal in stocks in banks) *the true and actual purpose for which said Detroit Bankers Company was created was in furtherance of a scheme to enable its stockholders, through agents appointed by them, to acquire, own, hold, control and operate a group of state and national banks and trust companies, and to enjoy and retain all of the benefits of ownership of said stock in said national and state banking institutions, and insure a continuation of dividends, and profits, advantages of ownership of the stocks in said bank, by centralizing under one operating agency, a large number of banks and banking functions, and also*

to enable said stockholders, through such agency, to extend their ownership and control over additional banks in Michigan by acquiring such additional banks, either by the exchange of holding company stock for bank stock, or by money drawn from the banks controlled by the holding company; also, to make it possible for banks so controlled to lend money on bank stocks, represented by the holding company stocks, all contrary to and in defiance of the meaning, spirit and intent of the laws of the United States and of the State of Michigan relating to the operation and supervision of banks and trust companies."

Record, page 11, paragraph 24:

"In order to satisfy state and federal authorities, and in order to obtain and hold public confidence, and to *assure the depositors and creditors of said banks and trust companies that they were the real, true, actual and beneficial shareholders of said banks and trust companies, and that the liability imposed by the laws of the United States and of the State of Michigan upon the shareholders of national and state banks, respectively, for the security and protection of the depositors and creditors thereof,* STILL RESTED UPON THE REAL, TRUE, ACTUAL AND BENEFICIAL OWNERS OF SAID BANK AND TRUST COMPANY SHARES, NOTWITHSTANDING THE FACT THAT SAID SHAREHOLDERS THEREOF WENT THROUGH THE FORM OF EXCHANGING SAID SHARES FOR SHARES IN SAID DETROIT BANKERS COMPANY, the stockholders of the Detroit Bankers Company caused to be inserted in the Articles of Association of Detroit Bankers Company, as Article IX-A thereof,"

Record, page 12, paragraph 25:

"In order to further assure the depositors and creditors of said banks and trust companies that the exchange of their stock did not affect their liability as bank stockholders, all of the stockholders of Detroit Bankers Company, individually and/or acting through duly appointed agents, made, issued, and published statements and advertisements advising the depositing public and the depositors and creditors of said banks and trust companies that the liability imposed by the laws of the United States and State of Michigan, upon the shareholders of national and state banks, respectively, for the security and protection of the depositors and creditors thereof, *was enforceable against said stockholders of Detroit Bankers Company,* in the same manner as said liability was then or thereafter enforceable against any other stockholder of a national or state bank under the laws of the United States or State of Michigan, respectively."

Record, page 14, paragraph 28:

"By virtue of these unlawful activities, the Detroit Bankers Company acquired the substantial control and/or ownership of the following banks and other financial corporations:"

and then follows an itemized list of some twenty-five banking institutions.

Record, page 16, paragraph 31:

"THE DETROIT BANKERS COMPANY, AS A CORPORATION, WAS A MERE AGENT, OR TRUSTEE, FOR THE REAL AND BENEFICIAL OWNERS OF THE STOCK IN THE VARIOUS UNITS, INCLUDING FIRST NATIONAL BANK-DETROIT, WHOSE CAPITAL STOCK STOOD IN THE NAME OF DETROIT

BANKERS COMPANY: THE STOCKHOLDERS IN DETROIT BANKERS COMPANY ARE THE REAL, TRUE AND BENEFICIAL OWNERS OF THE CAPITAL STOCK OF THE VARIOUS UNITS, WHOSE CAPITAL STOCK IS HELD BY THE DETROIT BANKERS COMPANY."

Record, page 17, paragraph 32:

"By reason of the matters hereinbefore alleged, THE REAL, TRUE AND BENEFICIAL OWNERS OF THE CAPITAL STOCK OF FIRST NATIONAL BANK-DETROIT, AT THE TIME OF ITS INSOLVENCY, WERE THE STOCKHOLDER OF SAID DETROIT BANKERS COMPANY, AND THE SAID DETROIT BANKERS COMPANY WAS THE REGISTERED OWNER MERELY AS TRUSTEE, OR AGENT, FOR THEIR BENEFIT."

Record, pages 17 and 18, paragraph 33:

This recites the Comptroller of the Currency's levying of an assessment under the National Bank Act:

"Upon the shareholders of First National Bank-Detroit for twenty-five million dollars ($25,000,000.00) to be paid by *them* on or before the 23rd day of June, 1933,"

which time was extended to July 31, 1933,

"AND DID MAKE DEMAND UPON EACH AND EVERY ONE OF THEM FOR THE PAR VALUE OF EACH AND EVERY SHARE OF THE CAPITAL STOCK OF SAID ASSOCIATION HELD OR OWNED BY THEM, RESPECTIVELY, AT THE TIME OF ITS FAILURE: AND THE SAID COMPTROLLER OF THE CURRENCY DID THEREUPON DIRECT THE AFOREMENTIONED C. O. THOMAS, RECEIVER, AND THE PLAINTIFF, AS HIS SUCCESSOR, AS AFORESAID, TO TAKE ALL THE NECESSARY PROCEEDINGS BY SUIT OR OTHERWISE TO ENFORCE TO THAT EXTENT THE INDIVIDUAL LIABILITY OF THE SAID SHAREHOLDERS."

Record, page 18, paragraph 34:

"Acting pursuant to the authority and in obedience to the aforesaid directions of the Comptroller of the Currency, said C. O. Thomas, as receiver of First National Bank-Detroit, and the plaintiff, as his successor, NOTIFIED ALL THE SHAREHOLDERS OF SAID BANK, INCLUDING BERTHA H. ROBERTSON, THE DEFENDANT NAMED HEREIN, OF THE FACT THAT THE COMPTROLLER OF THE CURRENCY DID LEVY SAID ASSESSMENT AND MADE THE SAME PAYABLE AT THE OFFICE OF THE RECEIVER OF SAID FIRST NATIONAL BANK-DETROIT ON OR BEFORE THE 31ST DAY OF JULY, 1933, AND LIKEWISE MADE DEMAND UPON SAID SHAREHOLDERS FOR PAYMENT OF SAID ASSESSMENT, INCLUDING BERTHA H. ROBERTSON, THE DEFENDANT HEREIN, IN ACCORDANCE WITH THE SAID ORDERS."

Record, page 20, paragraph 36:

"By reason of the facts and circumstances hereinbefore stated and alleged, *and the provisions of the statutes of the United States, and 12 U. S. C. A., Section 64, the defendant, Bertha H. Robertson, became liable to the plaintiff herein for the payment of that portion of said assessment liability represented by the one thousand thirteen (1,013) shares of Detroit Bankers Company stock registered in her name, as aforesaid.*"

And, upon the same page, the plaintiff further alleges that the shares of stock held by the defendant herein, Bertha H. Robertson, in Detroit Bankers Company, represented the ownership of 142.3850 shares of the capital stock of First National Bank-Detroit, and

"That the assessment levied by the Comptroller of the Currency against the shareholders of First National Bank-

Detroit amounts to the sum of $14.055775 per share of Detroit Bankers Company stock."

Record, page 21:

Among the provisions of the prayer the plaintiffs prays for judgment against the defendant Bertha H. Robertson for the payment of the unpaid principal balance of the said assessment. He had previously alleged [R. p. 20] a pretended claim in the sum of $2,082.65.

SCHRAM v. COTTON (SUP. CT., APP. DIV., STATE OF NEW YORK, JUNE 16, 1939), 12 N. Y. SUPP. (2D) 918. (Cited in Argument, p. 34.)

In this action Schram, receiver of the First National Bank-Detroit, brought suit against Bessie B. Cotton to enforce an assessment on stock owned by her. Judgment of the Supreme Court of New York County was that the plaintiff have summary judgment. The defendant had made a motion for judgment on the pleading. The defendant appealed. The order granting the plaintiff's motion for summary judgment was reversed and the motion denied and the order denying the defendant's motion for judgment on the pleadings was reversed and that motion granted. The hearing was before Martin, Presiding Judge, and O'Malley, Townley, Untermyer and Dore, Judges. Decision by Justice Untermyer.

The decision recites, substantially, the same facts as appear in the case at bar.

The Court recites that the Articles of Association of the holding company contained a provision, printed in full on its stock certificates, which was Article IX-A, and is set forth in full in the opinion.

The Court then recites the fact that the present action was begun on May 2, 1938, and the Court says, page 919, that it is:

"Maintained upon the theory, first, that the defendant as a stockholder of the holding company is in fact the beneficial owner of an aliquot part of the proportion of the stock of its subsidiary, First National Bank-Detroit, and thus subject to a statutory liability for her proportion of the assessment thereon; second, that under the Articles of Association printed on the certificate, the defendant is liable on contract for her proportion of the assessment against the holding company. On the motion for summary judgment, however *the plaintiff disclaimed any purpose to enforce the defendant's alleged statutory liability against which it is conceded the statute of limitations has run, and asserted only a claim on her contractual obligation* to pay her proportion of the assessment against the holding company."

The defendant resisted the motion for summary judgment and moved for a judgment on the pleadings and dismissal of the complaint on the ground that the action, not having been commenced within three years after the date of the assessment against the holding company, was barred by the statute of limitations (*Civil Practice Act,* Section 49, Subdivision 4), which statutory provision of the New York Practice Act is applicable to:

"An action against a director or stockholder of a monied corporation or banking association to recover a penalty or forfeiture imposed or to enforce a liability created by the common law or by statute."

The plaintiff, however, contended that this action was on contract and, therefore, maintainable at any time within six years, under Section 48, Subdivision 1, of the Practice Act, to-wit:

"An action upon a contract obligation or liability, express or implied."

The Court, in its opinion, page 920, said:

"Even though the obligation sought to be enforced by the motion for summary judgment is under contract (Barbour v. Thomas (6th Cir.), 86 Fed. (2d) 510; Backus v. Connolly, 268 Mich. 495, 256 N. W. 496), we think it is subject, nevertheless, to the same period of limitation as the statutory liability. In assuming that contractual obligation the defendant had the right to prescribe 'a shorter limitation' within which the action might be maintained. (Civil Practice Act, Section 10, Subdivision 1.) We are of the opinion that she has done so in the present case and that the defendant's contract does not impose upon her, as a stockholder of the holding company, nor was intended to impose a liability more extensive than could have been asserted against the holding company as a stockholder of First National Bank-Detroit. By the contract the defendant agrees to be liable for her share of 'any statutory liability imposed upon this corporation (the holding company) by reason of its ownership of shares of the capital stock of any bank or trust company,' *but that undertaking is qualified by the provision that it 'may be enforced in the same manner and to the same extent as statutory liability may now or hereafter be enforceable against stockholders of banks or trust companies under the laws under which said banks or trust companies are organized or operate.' The*

conclusion is unavoidable that, in so providing, the stockholders of the holding company intended that the enforcement of these contractual rights should be subject to the same restrictions, including any limitation as to time, as the statutory liability of the corporation which they contracted to pay.

"We are aware that in Schram v. Smith, 97 Fed. (2d) 662, the United States Circuit Court of Appeals for the Ninth Circuit has held otherwise. That decision proceeds exclusively upon the theory that the liability is contractual in character and disregards, as it seems to us, the limitations imposed by the provisions of the contract."

All members of the bench concurred.

DAVIS v. MILLS (1904), 194 U. S. 451, 48 L. ED. 1067. (Cited in Argument, p. 65.)

In this case Mr. Justice Holmes was applying *Section 554 of the Montana Code of Civil Procedure,* which section was contained in one of four chapters of Title II of the Montana Code relating to the time of commencing actions. Section 554 reads as follows:

"This title does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed or to enforce a liability created by law, but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability created."

The case was certified up to the Supreme Court by the Circuit Court of Appeals upon the following question:

"May a defendant in an action of the kind specified in Section 554 of the Code of Civil Procedure of Montana avail of the limitation therein prescribed, when the action is brought against him in the court of another state?"

It will be observed that what is here given as Title II, covering four chapters of the Montana Code of Civil Procedure, bearing upon the questions of the time of commencing actions, is covered by the *California Code of Civil Procedure* under *Part II, Title II, Time of Commencing Actions, Chapters 1, 2, 3 and 4, Sections 312 to 363,* both inclusive.

Mr. Justice Holmes, in answering the Circuit Court of Appeals' question, at page 454, speaks of the *ordinary limitation of actions* being treated as a general proposition in procedure law, and:

"as belonging to the *lex fori, as affecting the remedy only, and not the right.* But in cases where it has been possible to escape from that qualification by a reasonable distinction, *courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued.* The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. (Citing cases.) *But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was*

in a different statute, provided it was directed to the newly-created liability so specifically as to warrant saying that it qualified the right."

The Court then proceeds to consider other statutes of limitation of Montana providing for different periods of limitation, and says, page 455:

"But if Section 554 purported to make this substitution, it purported to introduce important changes. It lengthened the time on the one hand, *but it took away the exception in case of absence from the state on the other.* This last is disputed, but it seems to us a part of the meaning of the words, 'This title does not affect actions against directors,' etc. The section as to absence from the state is a part of the title, and whatever necessary exceptions may be made from the generality of the words quoted, this is not one of them."

The exception that Mr. Justice Holmes here speaks of is that contained in the *Montana Code of Civil Procedure, Section 541,* which is a copy of *Section 351, California Code of Civil Procedure.*

The Court further said, pages 455, 456, and we especially call the Court's attention to the fact that what follows distinctly shows that Mr. Justice Holmes had in mind that the defense of the *statute of limitations here plead went both to the remedy and the right:*

"A further difference is that, while there might be difficulties in construing the general limitation upon actions for penalties as going to the right, *this section is so specific that it hardly can mean anything else.* We express

no opinion as to the earlier act, but *we think that this section 554 so definitely deals with the liabilities sought to be enforced that, upon the principles heretofore established, it must be taken to affect its substance so far as it can, although passed at a different time from the statute by which that liability first was created.*"

And again the Court says:

"We come then to the question of power. *It is said that a statute of limitations cannot take away an existing right, but only remedies,* and therefore that, whatever the effect of Section 554 on subsequently accruing liabilities, it cannot bar the plaintiff in this suit."

The Court then proceeds to discuss constitutional questions of statutes of limitation taking away constitutional rights by amendment and in the conclusion of his discussion of this phase of the matter, at page 457, he says:

"Constitutions are intended to preserve practical and substantial rights, not to maintain theories. *It is pretty safe to assume that when the law may deprive a man of all of the benefits of what once was his, it may deprive him of technical title as well. That it may do so is shown sufficiently by the cases which we have cited and many others.*

"In the case at bar the question comes up in the most attenuated form. The law is dealing not with tangible property, but with a cause of action of its own creation. The essential feature of that cause of action is that it is one in the jurisdiction which created it; that it is one else-

where is a more or less accidental incident. *If the laws of Montana can set the limitation to the domestic suit, it is the least possible stretch to say that they may set it also to a foreign action, even if to that extent an existing right is cut down. We can see no constitutional obstacle in the way and we are of the opinion that they have purported to do it and have done it."*

It will be noted here that the Court *is not only discussing the matter of remedy that may be applicable* to a state action or a foreign action, but goes ahead to state that the remedy may cut down an existing right and, as the Court said:

"We are of the opinion that they have purported to do it and have done it."

We next find this same statute before the Court in the case of Williams, Receiver v. Hilger et al. (1926), 77 Mont. 399, 251 Pac. 524 (cited in Argument, p. 65).

This was likewise an action arising out of the failure of the directors of a corporation to file their annual reports, giving rise to an action by the receiver of the First National Bank against its directors.

It may be here stated that since the decision of *Davis v. Mills, supra, Section 554 of the Montana Code of Civil Procedure* had become *Section 9061, Montana Revised Codes.* The Court in *Williams, Receiver, v. Hilger, supra,* said:

"Under this particular statute of limitations, the running of the period is not only a bar to the remedy but extinguishes the existing right of action on the liability. Davis v. Mills, 194 U. S. 451, 48 L. Ed. 1067, construing our Section 554, Revised Code of 1895. Under the statute as thus construed the liability attaches as of March 21, 1921."

The Court further says, at page 404:

"Section 9061, in its present form, has been in effect since its enactment as *Section 554, Code of Civil Procedure of 1895, when it was adopted verbatim from the California Code of Civil Procedure, Section 359, California Code of Civil Procedure."*

The Court then refers to the California cases and their interpretation of that section.

This decision was followed and approved in *Brown v. Roberts et al.,* 78 Mont. 301, 305-307, 254 Pac. 419, and the same principle of law is laid down and the same Montana decisions are followed in *Furst v. Beggeh* (1934), 192 Minn. 454, 257 N. W. 79 and 80. This was an action in Minnesota against a resident of Minnesota, a stockholder of a Montana corporation, and there the Court construes Section 9061 of the Revised Codes of Montana, 1921, and says, concerning the decision of the lower Minnesota court:

"The Court further held that *Section 9061 of the Revised Code of Montana, 1921, must be construed, not as a statute of limitations and as such affecting the remedy*

only, BUT AS OF THE ESSENCE OF THE RIGHT ITSELF, *and that to enforce the right in any action plaintiff must show affirmatively that his action is timely.*

"That the Court was right in this regard is amply sustained by the decisions of the Supreme Court of that state. See Williams, Receiver, v. Hilger, 77 Mont. 399, 251 Pac. 524; Brown v. Roberts, 78 Mont. 301, 308, 254 Pac. 419."

CALIFORNIA CODE OF CIVIL PROCEDURE, SECTIONS 351 AND 359:

"Sec. 351. Exception, where defendant is out of the state. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action. (Enacted 1872.)"

"Sec. 359. This title not applicable to actions against directors, etc. Limitations in such cases prescribed. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created. (Enacted 1872.)"

List of Cases That Have a More or Less Direct Bearing Upon the Questions Growing Out of the Numerous Detroit Bank Failures in 1933.

Barbour v. Thomas (1933), 7 Fed. Supp. 271;

Simons v. Groesbeck (1934), 268 Mich. 495, 256 N. W. 496;

Fors v. Farrell (1935), 271 Mich. 358, 260 N. W. 886;

Barbour v. Thomas (C. C. A. 6, 1936), 86 Fed. (2d) 510 (cer. denied 300 U. S. 670, 81 L. Ed. 877);

Ullrich v. Thomas (C. C. A. 6, 1936), 86 Fed. (2d) 678 (cer. denied 301 U. S. 692, 81 L. Ed. 1348);

Schram v. Poole (C. C. A. 9, 1938), 97 Fed. (2d) 566;

Schram v. Smith (C. C. A. 9, 1938), 97 Fed. (2d) 662;

Schram v. Leyda (C. C. A. 9, 1938), 97 Fed. (2d) 665;

Schram v. Keane (1938), 279 N. Y. 227, 18 N. E. (2d) 136;

Schram v. Plym (D. C. Mich., 1933), 7 Fed. Supp. 478;

Schram v. Cotton (App. Div. N. Y., 1939), 12 N. Y. Supp. (2d) 918;

Strasburger v. Schram (1937), 68 App. D. C. 97, 93 Fed. (2d) 246.